Supreme Court, U.S.
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No. 10-667

In The
Supreme Court of the United States

WILLIAM MIRANDA-MARÍN,
MUNICIPALITY OF CAGUAS,

Petitioners,

v.

CARMEN L. RODRÍGUEZ-GARCÍA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In a Section 1983 suit litigated over the course of nine years, two jury trials were held in order to determine whether respondent's constitutional rights were violated by transferring her from a position she held as a career employee with the Municipality. The first jury determined that the Vice Mayor, the sole person who implemented respondent's transfer, did not undertake an adverse employment action and/or did not violate respondent's constitutional rights. Upon a new trial that presented exactly the same allegations, this time against Mayor Miranda-Marín and the Municipality, and in order to keep the second jury from adjudicating for a second time the legality of the transfer, petitioners requested a jury instruction to the effect that such verdict had been issued by a jury and had been affirmed by the First Circuit. The District Court for the District of Puerto Rico denied petitioners' request for such instruction, and the First Circuit Court of Appeals affirmed. As a result, the second jury found against petitioners.

Whether, by denying petitioners' collateral estoppel defense in the form of the requested jury instruction regarding the favorable prior verdict determining the legality of the transfer in controversy, the District Court allowed an already adjudicated matter to be relitigated.

QUESTION PRESENTED FOR REVIEW – Continued

Whether, as a matter of law, the evidence presented constituted sufficient evidence to impose personal responsibility over the highest ranking government official of the Municipality on a direct liability theory for failing to personally act upon a complaint raised by an employee.

PARTIES TO THE PROCEEDING

In addition to the names contained in the caption, Wilfredo Puig, Vice Mayor, was also a defendant in the case. However, he is not a party to this proceeding.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The panel opinion of the U.S. Court of Appeals for the First Circuit, dated June 21, 2010, is officially reported at 610 F.3d 756 (1st Cir. 2010) and is reproduced at App. 1-38.

The U.S. District Court for the District of Puerto Rico's opinion and order denying petitioners' request to instruct the jury about the verdict favorable to the Vice Mayor and validating the legality of the transfer, dated February 12, 2008, is reproduced at App. 97-103.

The second jury special verdict form is reproduced at App. 106-108.

The panel opinion of the U.S. Court of Appeals for the First Circuit, regarding the first jury trial, dated July 31, 2007, is officially reported at 495 F.3d 1 (1st Cir. 2007) and is reproduced at App. 41-70.

The U.S. District Court for the District of Puerto Rico's opinion and order denying petitioners' Rule 50(b) motion, dated August 18, 2008, is reproduced at App. 71-96.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2010. On September 9, 2010, petitioners applied to extend the time to file the petition for writ of certiorari from September 19, 2010 to November 18, 2010. On September 14, 2010, this Honorable Court granted petitioners' petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983: U.S. Code – Section 1983: Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rules of Evidence 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by any danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT

Respondent, Carmen Rodríguez-García, alleged political discrimination and retaliation against the Municipality of Caguas, Puerto Rico, its Mayor, William Miranda-Marín, and its Vice Mayor, Wilfredo Puig, both in their personal and official capacities. On a first jury trial the district court dismissed the allegations against Mayor Miranda-Marín as a matter of law. After the trial, the jury issued a verdict in favor of the Vice Mayor, determining, in the verdict form itself, that he did not undertake an adverse employment action and/or did not violate respondent's constitutional rights upon determining to transfer her as alleged, yet against the Municipality. Accordingly, the district court issued judgment as a matter of law vacating the jury verdict against the Municipality.

On appeal, the First Circuit affirmed (i) the district court's disposition via summary judgment of Rodríguez' political discrimination claim; (ii) the verdict in favor of the Vice Mayor on Rodríguez' retaliation claim; and, (iii) the decision of the district court vacating the jury award against the Municipality.

Notwithstanding, the First Circuit Court ordered a new trial on respondent's retaliation claim against Mayor Miranda-Marín and, consequently, the Municipality.

As in the first jury trial, the respondent on the second jury trial contended she was "deprived of her First Amendment rights **by transferring her** from the position in the Public Works Department [. . .] in retaliation for testimony she gave before the Ethics Office." (App. 73) (Emphasis supplied). However, on the second trial her allegations were only against Mayor Miranda-Marín, and the Municipality.

On the second jury trial, pursuant to the collateral estoppel doctrine, petitioners requested[1] the district court to instruct the jury regarding the verdict in favor of the Vice Mayor. In denying petitioners' request, the district court rationalized that the instruction requested would unduly influence the jury in determining issues that were closely related and factually related to the first jury's finding but that were not necessarily determined by the jury at the first trial, i.e., (i) whether respondent's transfer and alleged deprivation of duties constituted an adverse employment action; (ii) whether respondent was transferred at her own request or in retaliation for exercising her First Amendment Rights. According to

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[1] On the second jury trial, petitioners moved for dismissal of all claims at close of respondent's case in chief. The district court denied such motion, petitioners renewed their motion upon the close of their case in chief, and, once again, after the conclusion of the trial.

the district court, respondent could present evidence *regarding other municipal actors*, such as respondent's supervisor and the Municipality's human resources director, who could have taken affirmative decisions related to her transfer. (App. 86, and App. 102) However, on the second trial, respondent fully failed to present any evidence implicating in her transfer municipal actors other than the Vice Mayor.

During the course of the second trial, in order to establish knowledge of her protected activity and direct responsibility on Mayor Miranda-Marín's part for not reinstating respondent to the position she held before the alleged retaliatory transfer, respondent presented as evidence four (4) letters addressed to Mayor Miranda-Marín on the subject, in addition to her recollection of an incident which occurred at a public activity whereby respondent forcefully questioned Mayor Miranda-Marín on the status of her claim, to which, from respondent's own testimony, Mayor Miranda-Marín replied that he did not know to what she was making reference.

In sustaining the district court's denial for the requested jury instruction, the First Circuit held that, although, from the verdict form (App. 106-108) it was not discernible the theory upon which the jury found against the Mayor, whether a direct or indirect theory of liability, respondent's overall theory at trial was that Mayor Miranda-Marín was directly involved only in the failure to reinstate respondent, not that the Mayor had ever condoned any alleged adverse employment action, i.e., the transfer, by the Vice Mayor. Thus, the First Circuit determined that the verdicts in both trials were consistent. In sustaining the jury's

finding of liability against Mayor Miranda-Marín, the First Circuit indicated that whether or not Mayor Miranda-Marín received respondent's correspondence was a question of fact for the jury to determine and that respondent had presented sufficient evidence for a reasonable jury to have reached the conclusion arrived at the second jury trial. (App. 23)

The First Circuit's confirmation of the second jury verdict and the determination that the District Court correctly denied the requested jury instruction caused a substantial unjust prejudice upon the petitioners. Contrary to the First Circuit's conclusion, the failure to instruct the jury as requested by the petitioners did result in vastly contradictory verdicts.

The first jury determined that the one person solely implicated by respondent herself in her transfer had not undertaken an adverse employment action
(the transfer) against her or violated her constitutional rights. As such, the employment action on the Vice Mayor's part was fully validated as legal by a jury, the District Court and the First Circuit Court. On the other hand, the second jury was presented an identical set of facts to those presented to the first jury: the Vice Mayor continued to be implicated as the sole promoter of the transfer, while the Mayor was merely implicated as an indirect actor who failed to remedy the situation allegedly promoted by the Vice Mayor. As such, without the benefit of the instruction regarding the prior verdict validating the Vice Mayor's actions, the second jury was allowed to impose liability upon a passive actor for failing to

overturn or undo an adverse employment action that had previously been found not to have been perpetrated by the Vice Mayor and which respondent in the second trial fully failed to allocate to another actor within the Municipality.

The district court's fears that the instruction would unduly influence the jury regarding the possibility that other public officials had been actors as related to the determination to transfer respondent, resulted in the completely opposite consequence: it allowed the second jury to impose responsibility upon the Mayor for his alleged failure to remedy a situation for which nobody within the Municipality had been held accountable. Upon respondent's failure to establish at trial that some actor other than the Vice Mayor in fact undertook an adverse employment action against her, the instruction requested was essential to keep the jury from issuing a verdict against the Mayor for failing to remedy an adverse employment action which respondent could never establish occurred. Because respondent (plaintiff) failed to establish that any one actor other than the Vice Mayor in fact took an adverse employment action against her, thus there was no illegal act to be remedied, the allegations against the Mayor for failure to remedy could not proceed.

Petitioners respectfully posit that liability may not be premised upon a failure to remedy through reinstatement an allegedly illegal transfer, when a first jury had already determined that the only actor identified by respondent in either trial as responsible

for the transfer had not engaged in such an adverse employment action against respondent and respondent failed to implicate any single other actor in the determination to undertake the action in controversy. Upon denying the jury instruction requested by petitioners, the court allowed the second jury to revisit the issue regarding the alleged illegality of respondent's transfer when through the second jury trial no actor was identified as perpetrator of the employment act in controversy. The error committed in denying the instruction resulted in responsibility being erroneously imposed upon Mayor Miranda-Marín when the record clearly demonstrated that he did not directly participate in the transfer and no person other than the Vice Mayor was ever identified as perpetrator of such an act.

Clearly, the First Circuit's decision (App. 1-38) affirming the imposition of liability upon Mayor Miranda-Marín is fully contrary to that issued by the same Appellate Court upon a different appeal within the same case. (App. 41-70)

REASONS FOR GRANTING THE PETITION

The First Circuit Court's confirmation of the district court's denial of petitioners' collateral estoppel defense and request for jury instruction caused grave prejudice upon petitioners. The district court gravely erred in concluding that allowing the requested instruction would cause confusion and

would preclude the jury from analyzing respondent's arguments regarding her transfer in light of the actions of other Municipal officials as respondent failed to implicate, by her allegations or evidence presented in the second trial, any other actor in the perpetration of the transfer. In fact, it was the failure to instruct as requested which caused grave confusion upon the jury, allowing the jury, in this manner, to hold the Mayor liable for failing to remedy an alleged illegal act which occurrence was never established by respondent, either at the first trial, by means of the Vice Mayor, or at the second trial, by means of an alternative actor. Respondent presented at the second trial identical evidence to that presented in the first trial related to Vice Mayor Puig's decision to transfer her and which, according to respondent's theory, amounted to an adverse employment action. Vice Mayor Puig's decision to transfer respondent was determined to have been legal by a jury in the first trial. In the second trial, however, the district court, affirmed by the First Circuit, allowed respondent to re-litigate the validity of Vice Mayor Puig's actions upon her failure to implicate anyone else as the actor behind the transfer and the court's failure to provide the instruction regarding the prior favorable adjudication regarding the Vice Mayor. As a result, the second jury imposed liability (App. 106-108) upon Mayor Miranda-Marín for failing to remedy an illegal action that was never established as such. The court's fears regarding jury confusion actually materialized when it decided to withhold such pivotal information from the jury.

I. BY DENYING PETITIONER'S COLLATERAL ESTOPPEL DEFENSE, THUS, DENYING JURY INSTRUCTIONS REGARDING A PRIOR JURY VERDICT ON RELATED ALLEGATIONS, THE FIRST CIRCUIT CAUSED AN UNJUST PREJUDICE TO PETITIONERS

For purposes of Federal Rule of Evidence 403, the phrase "unfair prejudice" does not merely refer to the fact that a particular piece of evidence will have an adverse effect on a party's case. Rather, "unfair prejudice" within the context of the rule means undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. *United States v. Grassi,* 602 F.2d 1192 (1979, CA5 Fla), *reh. den.* (1979, CA5 Fla) 606 F.2d 321, and vacated on other grounds 448 U.S. 902 (1980). Prejudice is found where the court's error more probably than not tainted the verdict. *Mahone v. Lehman*, 347 F.3d 1170, 1172 (9th Cir. 2003).

In the case at hand, the district court based the denial of petitioners' request for jury instructions regarding the previous verdict in favor of Vice Mayor Puig on its conclusion that it would unduly influence the jury in determining issues that were closely related and factually related to the first jury's finding but that were not necessarily determined by the jury at the first trial, i.e., (i) whether respondent's transfer and alleged deprivation of duties constituted an adverse employment action; (ii) whether respondent was transferred at her own request or in retaliation

for exercising her First Amendment Rights. According to the district court, respondent could present evidence regarding other municipal actors, such as respondent's supervisor and the Municipality's human resources director, who themselves could have taken decisions related to her transfer. The First Circuit sustained the district court determination. (App. 86, App. 102)

The court's decision to deny petitioners' jury instruction caused them an unjust prejudice. On the first trial, contrary to the district court's opinion (App. 71-96) the jury made a finding regarding respondent's transfer when it credited Vice Mayor Puig's account of facts concerning the reasons behind respondent's transfer, and found him not liable for retaliation. As the First Circuit clearly stated in its 2007 decision regarding the first trial, "the contents of the conversation between Rodríguez-García and Vice Mayor Puig [were] hotly contested." (App. 46)

Notwithstanding respondent's testimony in the first trial[2] (which was basically the same as that

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[2] On the first trial respondent testified that she told Vice Mayor Puig that she wanted to return to her former position because she could work things out with her supervisor. She testified that Vice Mayor Puig told her that her supervisor had showed him a copy of the mail log that Rodríguez-García kept and that the Ethics Office was investigating the use of municipal resources to distribute political propaganda. Furthermore, that Vice Mayor Puig suggested to her that she would be summoned to testify and asked her what she would say. Respondent testified that she told Puig: "I told him that I'd tell the

(Continued on following page)

offered upon the second trial), "the jury rejected Rodríguez-García's claim that Vice Mayor Puig had taken an adverse employment action against her." (App. 54). To that regard, the First Circuit Court's July 31, 2007 opinion (App. 69-70) stated that "[t]he question of Vice Mayor Puig's liability turned largely on whether the jury credited Vice Mayor Puig's or (respondent's) testimony concerning the conversations (*See* footnote 2) that allegedly took place between them." Further, the First Circuit specifically cited respondent's closing argument in order to sustain the jury's finding in favor of Vice Mayor Puig:

> "Who do you believe? You heard Carmen, but no, the Vice Mayor tells us that on Feburary 18th Carmen requested a transfer to Federal Funds. Who hears him? Who remembers? . . . Who do you believe? . . . Shall we believe Wilfredo Puig, who very conveniently remembers that Carmen requested to go to Federal Funds [. . .] Who do we believe?" (App. 69-70)

It is clear, the first jury adjudicated and believed Vice Mayor Puig's version that respondent requested her transfer.

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truth. That I'd tell the truth because that was my job." According to respondent's testimony, Vice Mayor Puig told her that "whatever truth [she] said could affect him, the Mayor and the party, and [she] told him that [she] was very sorry, but that was [her] job." Finally, respondent testified that Vice Mayor Puig told her that "he could no longer count on [her]." According to the record of the first trial, shortly after the meetings where these conversations took place, respondent was transferred. (App. 46-47)

However, on the second trial, the court allowed respondent to re-litigate the reasons behind the transfer when it denied petitioners' collateral estoppel defense and refused to provide a jury instruction about Vice Mayor Puig's favorable verdict. Consequently, the second jury passed judgment over the same allegations regarding respondent's transfer but came to a different conclusion than the first jury. However, since Vice Mayor Puig was not a petitioner in the second trial and no other actor was implicated in the transfer, the jury found against Mayor Miranda-Marín, the only Municipality official who remained as a petitioner premised on an illegal action that was never established.

In *Biggins v. Hazen Paper Co.*, 111 F.3d 205 (1st Cir. 1997), the issue in controversy regarded the use of the offensive modality of the mutual collateral estoppel. In the instant case, the petitioners requested the above-mentioned instruction pursuant to the defensive modality of collateral estoppel. *See Blonder-Tongue Lab. Inc. v. University Foundation,* 402 U.S. 313 (1971) (endorsing the application of non-mutual defensive collateral estoppel); *see also Acevedo-García v. Vera-Monroig*, 351 F.3d 547, 573-75 (1st Cir. 2003) (offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does; the latter modality precludes a respondent from relitigating identical issues by merely switching adversaries, citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-31 (1979)).

It has been established that:

> In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the defendant's time and money are diverted from alternative uses – productive or otherwise – to relitigation of a decided issue. And, still assuming that the issue was resolved correctly in the first suit, there is reason to be concerned about the plaintiff's allocation of resources. Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or "a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure." *Acevedo García, supra*, citing *Blonder-Tongue Lab. v. University of Illinois Found.*, 402 U.S. 313, 329 (1971) (internal quotations and citations omitted)

Respondent's claim of retaliation is premised solely on her transfer and, significantly, as implemented solely by Vice Mayor Puig. (App. 73) Her claim rested on Vice Mayor Puig's knowledge of her participation

on the Ethic's Office investigation and her conversations with him prior to her transfer. It's exactly there, over those conversations (*See* footnote 2) and the subsequent transfer that her retaliation claim comes to life. That was specifically what the first jury decided: that the Vice Mayor had not taken an adverse employment action against her. Respondent fully and fairly litigated her claims of retaliation regarding her transfer, and she was unsuccessful. Unfortunately, the lower courts allowed her, in detriment of petitioners, a second opportunity to go over the same issues but against a different party who was not directly implicated but, rather, whose liability depended entirely on the determination regarding the legality of the transfer.[3]

The First Circuit determined that the second trial jury delivered a verdict against Mayor Miranda-Marín, on a direct actions theory, for his active participation in the failure to reinstate respondent to her former position. However, such a conclusion may not be reached from a consideration of the verdict. Even if respondent successfully presented a case that Mayor Miranda-Marín acted maliciously and with gross disregard to his public officer's duties in failing to

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[3] The First Circuit Court's analysis of the second jury's adjudication regarding respondent's alleged adverse employment action is premised on the conversations held between Vice Mayor Puig and respondent, the same conversations the first jury evaluated to issue a verdict in favor of the Vice Mayor. (App. 19-20, and App. 46-47)

reinstate respondent to her position, his actions should have been analyzed by the second jury in light of the first jury finding that the actor behind the transfer, Vice Mayor Puig, was not liable and the version of the facts credited by the first jury, that is, that respondent requested such transfer in response to her doctor's recommendation. The second jury could not go over facts that had been previously adjudicated by a jury unless respondent was successful in attributing the determination to transfer her to an actor other than the Vice Mayor. Because respondent failed to establish this, the second verdict, inevitably, contradicts the first jury verdict.

II. THE EVIDENCE WAS NOT SUFFICIENT TO ESTABLISH PERSONAL RESPONSIBILITY UPON MAYOR MIRANDA-MARÍN ON A DIRECT LIABILITY THEORY.

In confirming the second jury verdict, the First Circuit reasoned that Mayor Miranda-Marín was personally responsible on a direct liability theory because he failed to take action over respondent's requests to be returned to her previous position. However, in order for the First Circuit's responsibility theory to be feasible, Mayor Miranda-Marín's alleged omission to reinstate respondent necessarily has to be an action separate from her transfer, which was not the case.

According to the First Circuit, respondent presented evidence that Mayor Miranda-Marín "knew

that she had been transferred in retaliation for her Ethics Office complaint, knew of her repeated requests for reinstatement, and nevertheless refused to reinstate her." (App. 28-29) This reasoning necessarily attaches Mayor Miranda-Marín's responsibility regarding his alleged refusal to reinstate to the illegality of respondent's transfer. The First Circuit continued its analysis indicating that Mayor Miranda-Marín's responsibility results from his "direct participation in [respondent's] nonreinstatement, rather than any indirect authorization of alleged adverse actions by [the Vice Mayor]. (App. 29). The First Circuit unsuccessfully tried to bifurcate the allegation against Mayor Miranda-Marín from those against Vice Mayor Puig. However, such separation is highly improper.

Whether or not Mayor Miranda-Marín had a responsibility to reinstate respondent is necessarily intertwined with the legality of the personnel action which was ascribed to the Vice Mayor. If the Vice Mayor's employment action regarding respondent was legal, as the first jury determined when it found that the only actor implicated had not discriminated against respondent, no matter how many letters respondent sent to the Mayor's office complaining about such movement and requesting to be reinstated to her previous position, nor if the Mayor knew of or should have known of respondent's participation in the investigation of the Ethic's Office, did not activate a legal responsibility from Mayor Miranda-Marín to reverse Vice Mayor Puig's employment decision.

The First Circuit stated in its June 21, 2010 opinion that the issue to be decided on the second trial was "whether Mayor Miranda-Marín [was] personally liable for [respondent's] alleged retaliation." (App. 29). However, the district court and the First Circuit's analysis failed to recognize that the only adverse employment action allegedly imposed upon respondent was her transfer; an issue that was decided by the first jury. In order to impose liability upon Mayor Miranda-Marín for his omission, there had to be a finding that the transfer in controversy was discriminatory. As it has been fully argued above, the first jury determined that respondent's transfer, implemented by the Vice Mayor, was not illegal or implemented with a retaliatory animus.

As in the first jury trial, respondent argued that she and her legal counsel addressed four letters to Mayor Miranda-Marín,[4] whereby respondent requested Mayor Miranda-Marín to reinstate her to her former position. On June 27, 2001, respondent wrote one last letter to Mayor Miranda-Marín. (App. 6-7). In her letters, respondent consistently complained and identified Vice Mayor Puig as the only person who, allegedly, took an adverse employment action against her.

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[4] The letters were dated March 3, 8, April 10 and May 31st, 2000.

The First Circuit summarized the second trial evidence against Mayor Miranda-Marín as follows:

> "The jury heard evidence that [Plaintiff's] attorney sent at least three letters to [the Mayor] regarding her transfer and request for reinstatement [. . .]. Human Resources responded to [one of the letters], stating that the letter had been referred by the [M]ayor and that [Plaintiff] would be reinstated. [. . .] [A]part from [Plaintiff's] letter to the [M]ayor, the record contains additional evidence that the [M]ayor was aware of the Ethics Office investigation, her claim of retaliatory transfer, and her request for reinstatement." (App. 21)

Taking such evidence as the true version of these facts, Petitioners respectfully posit that the same, as a matter of law, is not sufficient to find that Mayor Miranda-Marín took an adverse employment action nor had a retaliatory and/or discriminatory animus against respondent.

Government officials may be held liable "if the plaintiff can establish that her constitutional injury resulted from the direct acts or omissions of the official, or from indirect conduct that amounts to condonation or tacit authorization." *Rodríguez Garcia v. Municipality of Caguas (Rodriguez II)*, 495 F.3d 1, 10 (1st Cir. 2007). Under Section 1983, a government official "may not be held liable for the unconstitutional conduct of their subordinates under the

theory of respondeat superior." *Sanchez v Pereira-Castillo*, 590 F.3d 31, 49 (quoting *Ashcroft v Iqbal*, 129 S.Ct. 1937, 1848 (2009)). Whether respondent asserts responsibility against Mayor Miranda-Marín under a direct or indirect theory, respondent must show that the Mayor "was put on some kind of notice of the alleged violations, for one cannot make a 'deliberate' or 'conscious' choice to act or not to act unless confronted with a problem that requires the taking of affirmative steps." *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 902 (1st Cir. 1988).

The allegations against Mayor Miranda-Marín cannot be considered in a vacuum. They are strictly and inevitably related to the employment action taken by the Vice Mayor. Respondent claimed that she suffered emotional damages because the Vice Mayor transferred her in retaliation for her participation in the Ethics Office's investigation against her former supervisor. The letters respondent and/or her counsel sent to the offices of Mayor Miranda-Marín versed to that effect. Respondent did not complain of any other employment action or of any other government official to have discriminated against her.

Respondent's claim against Mayor Miranda-Marín is strictly that he did not revoke Vice Mayor's personnel action when put on notice of it. However, the first jury validated the Vice Mayor's action when it found that he did not discriminate against respondent when ordering her transfer. Since the first jury determined that the essential and base action, the transfer, did not constitute a violation of respondent's

constitutional rights thus, was legal, the omission and/or refusal to revoke such action cannot be considered, by itself, a retaliatory act.

CONCLUSION

The First Circuit validated a harmful error that allowed a second jury to pass judgment over facts already adjudicated, causing conflicting decisions. Furthermore, its decision imposed liability over the highest ranking officer of a Municipality without evidence to sustain his alleged wrongful actions. Allowing the First Circuit decision to stand would heighten the responsibility of a public servant to a degree that almost anything becomes a source of responsibility for failure to act. A hypothetical example that would result from this decision is that the President of the United States could be personally held liable for an alleged wrong doing of the federal government if the person who feels wronged writes him a couple of letters.

That, simply stated, is intolerable and puts at risk the ability of our system to recruit officials both elected or as career employees.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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November 18, 2010.

United States Court of Appeals
For the First Circuit

Nos. 08-2319, 08-2320

CARMEN L. RODRÍGUEZ-GARCÍA,
Plaintiff, Appellee, Cross-Appellant,
v.
WILLIAM MIRANDA-MARÍN,
MUNICIPALITY OF CAGUAS,
Defendants, Appellants, Cross-Appellees,
WILFREDO PUIG, Defendant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO
[Hon. Bruce J. McGiverin, U.S. Magistrate Judge]

Before
Lipez, Baldock* and Howard,
Circuit Judges.

Luis Pabón-Roca, with whom Grisselle González-Negrón and Faccio & Pabón-Roca were on brief, for the Municipality of Caguas.

José Enrico Valenzuela-Alvarado, Assistant Solicitor General, with whom Irene S. Soroeta-Kodesh, Solicitor General, Leticia Casalduc-Rabell, Deputy Solicitor General, and Zaira Z. Girón-Anadón,

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* Of the Tenth Circuit, sitting by designation.

Deputy Solicitor General, were on brief, for William Miranda-Marín.

Godwin Aldarondo-Girald for Carmen L. Rodríguez-García.

June 21, 2010

LIPEZ, *Circuit Judge.* Carmen Rodríguez-García, a career employee of the Municipality of Caguas, brought suit against Mayor William Miranda-Marín, Vice Mayor Wilfredo Puig, and the municipality, alleging violations of the First Amendment and Puerto Rico law. She claimed, inter alia, that she was transferred from her position in the Public Works Department ("Public Works")[1] to the Office of Federal Funds ("Federal Funds") in retaliation for testimony she gave before the Puerto Rico Government Ethics Office. In a prior appeal, we affirmed a jury verdict in favor of Puig, but remanded for a new trial against Miranda-Marín and the municipality. *Rodríguez-García* v. *Municipality of Caguas* ("*Rodríguez II*"), 495 F.3d 1 (1st Cir. 2007).[2] On remand, a magistrate

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[1] The title of this department (in Spanish, "Departamento de Limpieza, Ornato y Urbanismo") has been variously translated by the parties as "Beautification," "Ornate," "Cleaning, Beautification and Urbanism," and "Public Works." We will refer to it as Public Works.

[2] This is actually the third time this case has come before us. Initially, the district court granted summary judgment for

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judge presided over the trial by the consent of the parties, *see* 28 U.S.C. § 636(c), and the jury found in Rodríguez-García's favor and awarded her $350,000 in compensatory damages.

Miranda-Marín and the municipality appeal from the judgment and the denial of several of their post-trial motions. Rodríguez-García cross-appeals from the grant of defendants' post-trial motion to alter or amend the judgment, which had the effect of preventing the recovery of double damages pursuant to a provision of Puerto Rico law. We affirm in all respects.

I.

A. Factual Background

For the purpose of background, we recite here some of the relevant facts in the light most favorable to the jury verdict. *Visible Sys. Corp.* v. *Unisys Corp.*, 551 F.3d 65, 69 (1st Cir. 2008).[3] We recount the trial evidence in more detail when we analyze defendants' challenge to the sufficiency of the evidence.

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defendants on the ground that Rodríguez-García's claims were time-barred. We vacated that decision and remanded the case for further proceedings. *See Rodríguez-García* v. *Municipality of Caguas*, 354 F.3d 91, 100 (1st Cir. 2004) (*Rodríguez I*).

[3] The facts of this case substantially overlap with the facts recounted in *Rodríguez II*. Where appropriate, we borrow verbatim from our previous recitation of the facts and procedural history.

1. Transfer

Rodríguez-García served as an executive secretary to Luisa Flores, director of Public Works, from 1998 until her transfer in 2000. In the course of processing incoming mail, Rodríguez-García noticed that Flores was receiving tickets to political fundraisers and invitations to meetings for the Popular Democratic Party ("PDP"), the party to which the mayor and Flores belonged. Rodríguez-García was concerned that the receipt of this material violated ethics rules prohibiting the use of government resources to further political campaigns. Nevertheless, she duly logged the materials and delivered them to Flores.

On two occasions in 1999, Rodríguez-García raised her concerns with Flores about the receipt of political materials in the office. Flores ignored her complaints and continued to receive political materials; sometimes, she stapled political fundraiser tickets to office employees' paychecks. Rodríguez-García next raised her concerns with Roberto Carrasquillo, a distant relative and municipal assemblyman for the Puerto Rican Independence Party ("PIP"). Carrasquillo confirmed the merits of her concerns and reported the matter to the Puerto Rico Government Ethics Office. Carrasquillo also denounced the complained-of practice in press releases, newspaper columns, and media interviews.

On December 21, 1999, Rodríguez-García was summoned to appear before the Ethics Office, where

she provided sworn testimony regarding her complaint. As part of its investigation, the Ethics Office issued summonses to a number of other municipal employees, including Flores, who notified Mayor Miranda-Marín that she had been summoned.

On February 1, 2000, Flores had a discussion with Rodríguez-García, unrelated to the Ethics Office investigation, about the assignment of a particular job task. Rodríguez-García left the office upset and did not come to work the following day. When she returned on February 3, she had a heated discussion with Flores about the missed day of work. Shortly after that discussion, Rodríguez-García fainted and required medical treatment.[4] On the recommendation of her doctor, she rested at home for several weeks. On February 18, she delivered a copy of her medical release to Human Resources and then met with Vice Mayor Puig to discuss her absence and planned return to work. She returned to work several days later, on February 21 or 22.

On the morning of her return, Rodríguez-García called Puig's office to explain that she was back at the Public Works office. She was instructed to leave Public Works and report to Human Resources, where she was informed that she would be transferred to another department. After initial assignment to the

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[4] Medical testimony at trial revealed that Rodríguez-García had a history of depression and other psychological ailments and had been prescribed a variety of medications.

Education Department, which had no work or space for her, Rodríguez-García was transferred to Federal Funds. She had not requested a transfer and asked to return to her position in Public Works. Although Rodríguez-García retained the same job title and salary in Federal Funds, her job responsibilities were significantly reduced.

2. Attempted Reinstatement

On March 3, 2000, Rodríguez-García wrote a letter to Human Resources requesting a written explanation for her transfer.[5] In the months that followed, her attorney, Eladio Cartagena, wrote three letters on her behalf to Mayor Miranda-Marín, who had the final authority to transfer and reinstate municipal employees. Cartagena's first letter to the mayor, dated March 8, requested Rodríguez-García's reinstatement to Public Works and suggested that her transfer was motivated by the Ethics Office complaint. Cartagena received a reply from Human Resources dated March 27 that began, "The Hon. William Miranda Marín, Mayor, has referred to us your letter dated March 8, 2000 concerning the transfer of Mrs. [Rodríguez-García]." The letter stated that the transfer had been made at Rodríguez-García's request, that it was considered a temporary transfer, and that "we would have no inconvenience

[5] Rodríguez-García hand-delivered her letter to Human Resources and the office of the vice mayor.

in newly reinstating Mrs. [Rodríguez-García] to her former position" in Public Works.

Cartagena sent a second letter to the mayor on April 10 requesting the offered reinstatement. A copy of the letter was also sent to Heriberto Martínez, director of the Legal Advisor's Office. In a conversation on April 10, Martínez informed Cartagena that Rodríguez-García's reinstatement was pending and there would be a meeting between the personnel department and Rodríguez-García's supervisor in Public Works, Flores. Cartagena sent a third letter to Miranda-Marín dated May 31, informing him that, on the basis of the offered reinstatement, Rodríguez-García had met with the interim Human Resources director and the director of Public Works and they had refused to reinstate her. The May 31 letter further notified the mayor of Rodríguez-García's intention to file a civil action based on the retaliatory transfer and refusal to reinstate her.

Later that year, in September 2000, Rodríguez-García happened upon Mayor Miranda-Marín in a public square. She approached him, grabbed his arm, shook him, and asked about her case. He asked what was happening to her. Before she could elaborate, she was escorted away by his assistants.

In October 2000, Rodríguez-García filed a petition against the municipality and Flores in the

Superior Court of Puerto Rico.[6] Cartagena spoke to the press about the suit, explaining Rodríguez-García's allegations that she had been unlawfully transferred in retaliation for her Ethics Office complaint. Miranda-Marín responded to Rodríguez-García's claims in a television interview.

On June 27, 2001, Rodríguez-García wrote to Miranda-Marín a final time, complaining that she lacked significant work responsibilities and was depressed. She entreated him to resolve her complaint and reinstate her to her former position. She was never reinstated to her position at Public Works. She remained in her position at Federal Funds until sometime in 2003, when she was transferred to the Department of Building Conservation.

B. Procedural History

On November 7, 2001, Rodríguez-García filed this action in federal court against the municipality, Mayor Miranda-Marín, and Vice Mayor Puig. She alleged that the defendants transferred and refused to reinstate her because of her political affiliation and in retaliation for her testimony before the Ethics Office, in violation of the First Amendment and

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[6] The petition was subsequently amended to include a political discrimination claim; the amended petition did not include Flores as a defendant as she had died in the interim. Rodríguez-García later filed and was granted a voluntary dismissal of the petition without prejudice.

Puerto Rico law. She brought her federal law claims pursuant to 42 U.S.C. §§ 1981, 1983 and 1985.

In August 2004, the district court granted partial summary judgment to defendants, dismissing Rodríguez-García's political discrimination claim and her claims under §§ 1981 and 1985. In December 2004, Rodríguez-García proceeded to trial on her surviving retaliation claim. In a pretrial evidentiary ruling, the court ruled that Cartagena's March 8, April 10 and May 31 letters to the mayor, and the March 27 letter in response, could be offered as evidence only for the limited purpose "of negating defendants' contention that plaintiff herself requested a transfer," and not as evidence of the mayor's knowledge of Rodríguez-García's claim. At the close of Rodríguez-García's case, the court granted judgment as a matter of law to Miranda-Marín in his personal capacity under Federal Rule of Civil Procedure 50(a), concluding that the remaining evidence was insufficient as a matter of law to establish that the mayor knew of Rodríguez-García's employment situation, and therefore he could not be held personally liable for her transfer or nonreinstatement.

At the trial's conclusion, the jury found in favor of Puig, rejecting Rodríguez-García's claim that the vice mayor had taken an adverse employment action against her. However, the jury found that she had established municipal liability for that adverse employment action and awarded her $285,000 in damages. The court granted the municipality judgment as a matter of law under Federal Rule of Civil Procedure

50(b), finding the verdict inconsistent with Rodríguez-García's theory at trial that municipal liability derived from Puig's retaliatory acts.[7]

On appeal, we affirmed the jury verdict in favor of Puig, but held that the court erred in dismissing the case against Miranda-Marín based on its erroneous limitation on the use of the letters between attorney Cartagena and the mayor. *Rodríguez II,* 495 F.3d at 14. As we explained, if the letters had been correctly admitted as evidence of his knowledge of Rodríguez-García's complaint and the mayor's personal involvement in addressing it, "she would have had a basis for arguing that the mayor knew about and was directly involved in the disposition of her transfer and the failure to remedy it." *Id.* at 13. We therefore granted Rodríguez-García's request for a new trial against the mayor and, because municipal liability could be premised on the mayor's liability, against the municipality as well. *Id.* at 14.

Prior to the start of the second trial, Miranda-Marín and the municipality (hereafter, "defendants") filed a motion in limine requesting that the jury be instructed that Puig took no adverse employment action against Rodríguez-García, based on the jury verdict in the first trial. The court denied the motion.

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[7] The court noted that Rodríguez-García had also pursued a theory of municipal liability based on Miranda-Marín's conduct, but that the court had dismissed the claims against the mayor on his Rule 50(a) motion.

Defendants also filed a motion in limine arguing that Rodríguez-García should be barred from presenting a claim under Puerto Rico Law 115, P.R. Laws Ann., tit. 29, § 194a, because, inter alia, she had waived that claim by not pursuing it in the first trial. Law 115, which prohibits discrimination against employees for offering testimony before a legislative, administrative or judicial forum, provides that "[t]he employer's liability regarding the damages and the unearned salaries shall be double the amount determined as having caused the violation" of this provision. P.R. Laws Ann., tit. 29, § 194a(a), (b). The court denied the motion, concluding that Rodríguez-García could proceed to trial on her Law 115 claim.

At the close of Rodríguez-García's case, defendants moved for judgment as a matter of law under Rule 50(a), which the court denied. The jury returned a verdict in her favor against both the mayor and the municipality and awarded Rodríguez-García $350,000 in compensatory damages for emotional pain and suffering. The court doubled the damages award pursuant to Law 115, issuing a judgment against defendants in the amount of $700,000.

In post-trial motions, defendants challenged both the verdict and the damages award. Defendants filed a renewed motion for judgment as a matter of law under Rule 50(b), contending that the evidence was insufficient to support a finding of liability as to either the mayor or the municipality. Defendants also moved for a new trial and for remittitur of the damages award under Federal Rule of Civil Procedure 59,

contending that the court erred in refusing to give the requested jury instruction as to Puig and that the $350,000 damages award was excessive. Finally, defendants moved to alter or amend the judgment under Rule 59(e) on the ground that Rodríguez-García had waived her Law 115 claim and therefore the court should not have doubled the jury award.[8]

The court denied defendants' motions for judgment as a matter of law, a new trial, and remittitur, but granted their motion under Rule 59(e) on the ground that Rodríguez-García had waived her Law 115 claim. Accordingly, it entered an amended judgment in the amount of $350,000.

Miranda-Marín and the municipality appeal, contending that (1) the evidence was insufficient to support the finding of liability, (2) the court erred in failing to give the requested jury instruction as to Puig, and (3) the damages award was grossly excessive. As a result, defendants argue, the court erred in denying their motions under Rules 50(b) and 59 for judgment as a matter of law, a new trial, and remittitur. Rodríguez-García cross-appeals, contending

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[8] Defendants' motion for a new trial under Rule 59 focused on the requested jury instruction and the damages award. Although the motion contained a conclusory statement that the verdict was against the weight of the evidence, it made no argument on this point. Accordingly, the trial court treated defendants' motion for judgment as a matter of law as raising a challenge to the sufficiency of the evidence, and their motion for a new trial as raising challenges to the damages award and the court's refusal to give the requested jury instruction.

that she did not waive her Law 115 claim and therefore the court erred in granting defendants' Rule 59(e) motion to amend the judgment.

II.

A. Standard of Review

We review the denial of a renewed motion for judgment as a matter of law de novo as to questions of law. *Valentín-Almeyda* v. *Municipality of Aguadilla,* 447 F.3d 85, 95 (1st Cir. 2006). As to matters of fact, we view the evidence "in the light most favorable to the verdict, making no determinations of our own as to the credibility of witnesses or the weight of the evidence, reversing only if a reasonable person could not have reached the conclusion of the jury." *Id.* at 95-96 (internal quotation marks and citation omitted). We review the denial of a motion for a new trial for abuse of discretion. *Jennings* v. *Jones,* 587 F.3d 430, 436-37 & n.7 (1st Cir. 2009). The district court "has the power and duty to order a new trial whenever, in its judgment, the action is required in order to prevent injustice." *Id.* at 436 (quotation marks and citation omitted). We likewise review the denial of a motion for remittitur for abuse of discretion, reversing only if "the jury's verdict exceeds any rational appraisal or estimate of the damages that could be based on the evidence before the jury." *Astro-Med, Inc.* v. *Nihon Kohden America, Inc.,* 591 F.3d 1, 13 (1st Cir. 2009) (internal quotation marks and citation omitted).

B. Sufficiency of the Evidence

Defendants contend that the court erred in concluding that there was sufficient evidence to sustain the jury's finding that defendants retaliated against her for speaking out against the receipt of political materials in her office.[9]

"Public employees do not lose their First Amendment rights to speak on matters of public concern simply because they are public employees." *Curran* v. *Cousins,* 509 F.3d 36, 44 (1st Cir. 2007). Instead, "[t]he First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate." *Rutan* v. *Repub. Party of Ill.,* 497 U.S. 62, 76 (1990). We have articulated a three-part test for determining whether a challenged employment action violated a public employee's First Amendment right to freedom of speech. First, the court examines "'whether the employee spoke as a citizen on a matter of public concern.'" *Curran,* 509 F.3d at 45 (quoting *Garcetti* v. *Ceballos,* 547 U.S. 410, 418 (2006)). Second, the court must "balance . . . the interests of the [employee], as a citizen, in commenting upon

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[9] Such a violation of First Amendment rights by a state actor is actionable under section 1983, which imposes liability on any person who, under color of state law, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . ." 42 U.S.C. § 1983.

matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 44 (quoting *Pickering* v. *Bd. of Educ.*, 391 U.S. 563, 568 (1968)). Third, the employee must "show that the protected expression was a substantial or motivating factor in the adverse employment decision." *Id.* at 45. If the employee demonstrates that the speech was a substantial or motivating factor in the employer's retaliatory action, the employer may avoid liability by showing that it would have reached the same decision even absent the protected conduct. *Id.* This is the so-called *Mt. Healthy* defense. *See Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977).

Defendants primarily contend that the evidence presented at trial is insufficient to support the jury finding that (1) Rodríguez-García suffered an adverse employment action sufficient to support her § 1983 claim, (2) defendants would not have taken the same adverse employment action in the absence of her protected conduct, (3) the mayor is personally liable for retaliation under § 1983, and (4) the municipality is liable under § 1983. We address each challenge in turn.[10]

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[10] Defendants also claim that Rodríguez-García's sworn testimony before the Ethics Office does not constitute speech on a "matter of public concern," *see Connick* v. *Myers*, 461 U.S. 138, 146 (1983), because Carrasquillo, not Rodríguez-García, initiated the complaint with the Ethics Office. Defendants did not

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1. Adverse Employment Action

Actions short of dismissal or demotion, including denials of promotions, transfers, and failures to recall after layoff, can constitute adverse employment actions. *Rutan,* 497 U.S. at 75; *see also Morales-Tañon* v. *P.R. Elec. Power Auth.,* 524 F.3d 15, 19 (1st Cir. 2008). Employment actions are sufficiently adverse to support a First Amendment § 1983 claim "if those actions, objectively evaluated, would 'place substantial pressure on even one of thick skin to conform to the prevailing political view.'" *Bergeron* v. *Cabral,* 560 F.3d 1, 8 (1st Cir. 2009) (quoting *Agosto-de-Feliciano* v. *Aponte-Roque,* 889 F.2d 1209, 1218 (1st Cir. 1989) (en banc)), *abrogated on other grounds by Maldonado* v. *Fontanes,* 568 F.3d 263 (1st Cir. 2009). This standard is met "when the employer's challenged actions result in a work situation 'unreasonably inferior' to the norm for the position." *Agosto-de-Feliciano,* 889 F.2d at 1218; *see also id.* at 1218,

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raise this argument in the district court, in either their Rule 50(a) or 50(b) motions, and it is therefore waived. *See Parker* v. *Gerrish,* 547 F.3d 1, 12 (1st Cir. 2008) (issue is waived on appeal if not pressed in Rule 50 motion). Defendants also direct our attention to *Garcetti,* in which the Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 547 U.S. at 421. However, defendants make no effort to explain how *Garcetti* applies, if at all, to the facts of this case, and we thus deem this argument waived for lack of appellate development. *United States* v. *Zannino,* 895 F.2d 1, 17 (1st Cir. 1990).

1220 (explaining that factfinder must "canvass the specific ways in which the plaintiff's job has changed" and "determine whether the employee has retained duties, perquisites and a working environment appropriate for his or her rank and title").

Emphasizing that Rodríguez-García did not receive a reduction in salary or change in job title when she was transferred to Federal Funds, defendants contend that the evidence does not support a finding that her transfer and nonreinstatement amounted to an adverse employment action. We disagree. Although she retained the same job title and salary after her transfer to Federal Funds, her job duties and working environment were substantially altered. In Public Works, a large, active office, Rodríguez-García had a variety of job responsibilities including logging incoming mail, maintaining the director's schedule, organizing files, taking dictation, creating letters, and working with other departments on human resources and administrative matters. After her transfer to Federal Funds, a small office that already had an executive secretary, Rodríguez-García had few tasks assigned to her. Although she occasionally scanned the newspaper for announcements of Federal Funds proposals, opened incoming mail, made photocopies, or answered the phone if the other executive secretary was absent, she spent most of her time doing nothing. She could not assist in many office tasks, such as performing Internet searches and taking dictation in English, because she was not proficient in English, and she could not

compete for employment awards or bonuses because she performed few job duties. In addition, she was assigned to work in a windowless storage area alongside cleaning materials and inactive files. A reasonable jury could conclude that these assignments and working conditions were unreasonably inferior to the norm for Rodríguez-García's position of executive secretary.[11]

2. *Mt. Healthy* Defense

Defendants do not contend that Rodríguez-García failed to establish that her protected conduct was a substantial or motivating factor in the adverse employment decision. Instead, they argue that no reasonable jury could have rejected their *Mt. Healthy* affirmative defense. A defendant seeking the protection of the *Mt. Healthy* defense bears the burden of persuasion "to prove by a preponderance of the evidence that the adverse employment action would have been taken 'even in the absence of the protected conduct.'" *Guilloty Perez* v. *Pierluisi*, 339 F.3d 43, 56 (1st Cir. 2003) (quoting *Mt. Healthy*, 429 U.S. at 287). Thus, even if the defendant's actions were motivated in part by the plaintiff's protected conduct, the

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[11] Defendants also suggest, based largely on the testimony of the director of Federal Funds, Gilberto Charriez, that Rodríguez-García performed many job tasks in Federal Funds and seemed happy in her position there. However, the jury was free to credit Rodríguez-García's description of her working conditions and reject Charriez's conflicting testimony.

defendant can still prevail if he or she can show that the protected conduct was not the "but-for" cause of the adverse action. *Rodríguez-Marín* v. *Rivera-González*, 438 F.3d 72, 81 (1st Cir. 2006).

Defendants argue that the evidence conclusively established that Rodríguez-García would have been transferred even absent her involvement in the Ethics Office investigation. Their *Mt. Healthy* defense relies primarily on testimony from Vice Mayor Puig. Puig testified that in early February 2002, Rodríguez-García came to his office distraught and informed him that she had had a heated argument with Flores and did not want to return to Public Works and that, for health reasons, her doctor had recommended that she be transferred out of that department. Puig further testified that he then arranged for her transfer to accommodate this request.

Rodríguez-García presented a different account of her transfer. She testified at trial that she had not requested the transfer, her doctor had not recommended it for health reasons, and she preferred to stay in her position in Public Works. She also offered the letters she and her attorney had sent to Human Resources and Mayor Miranda-Marín shortly after her transfer, which sought an explanation for the transfer and requested reinstatement to her position in Public Works. Given this conflicting evidence, a reasonable jury could find that Rodríguez-García's testimony before the Ethics Office, and not her purported transfer request, was the but-for cause of the

transfer.[12] We conclude that the jury could reasonably reject defendants' *Mt. Healthy* defense.[13]

3. Personal Liability of Mayor Miranda-Marín

Although government officials "'may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*,'" *Sanchez* v. *Pereira-Castillo*, 590 F.3d 31, 49 (quoting *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1948 (2009)), officials may be held liable "if the plaintiff can establish that her constitutional injury resulted from the direct acts or omissions of the official, or from indirect conduct that amounts to condonation or tacit authorization," *Rodríguez II*, 495 F.3d at 10 (internal quotation marks and citation omitted). Under either a

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[12] In addition, there is no evidence indicating that Rodríguez-García's repeated requests for *reinstatement* between February 2000 and 2003 would have been refused even in the absence of her protected conduct.

[13] Defendants also suggest that, under the second prong of our test outlined above, the First Amendment interests in this case are outweighed by a legitimate government interest in curtailing plaintiff's speech. *See Pickering*, 391 U.S. at 568. However, instead of addressing the nature of Rodríguez-García's speech and why they had legitimate interests in curtailing it, defendants simply reiterate their contention that Rodríguez-García was transferred at her own request rather than in retaliation for her Ethics Office complaint. This contention relates to defendants' motivation for the adverse employment action, not to the balancing of employee speech and government interests. To the extent that defendants intend to raise a distinct argument under *Pickering*, it is deemed waived for lack of appellate development. *Zannino*, 895 F.2d at 17.

direct or indirect theory of liability, "the plaintiff must show that the official had actual or constructive notice of the constitutional violation." *Id.* (citing *Lipsett* v. *Univ. of P.R.*, 864 F.2d 881, 902 (1st Cir. 1988) ("An important factor in making the determination of liability is whether the official was put on some kind of notice of the alleged violations, for one cannot make a 'deliberate' or 'conscious' choice to act or not to act unless confronted with a problem that requires the taking of affirmative steps.")).

Defendants maintain that the mayor cannot be held personally liable because he knew nothing about Rodríguez-García's Ethics Office complaint, her claim that she was transferred in retaliation for that complaint, or her request for reinstatement until after this action was filed in federal court. However, ample evidence supports a finding to the contrary. The jury heard evidence that Rodríguez-García's attorney sent at least three letters to Miranda-Marín regarding her transfer and request for reinstatement, dated March 8, April 19, and May 31, 2000. Human Resources responded to the March 8 letter, stating that the letter had been referred by the mayor and that Rodríguez-García would be reinstated. In addition, Rodríguez-García herself sent a letter to the mayor dated June 27, 2001, again complaining of her transfer and requesting reinstatement. Defendants insist that the mayor never personally received any of these letters, pointing to evidence that correspondence addressed to the mayor was routinely diverted to the appropriate municipal office or department before

reaching him. However, as we determined in *Rodríguez II,* whether the mayor personally received the letters sent to him is "a factual question appropriate for jury determination," *id.* at 13, and here the jury heard the evidence and rejected the mayor's claim of lack of notice.

Furthermore, apart from Rodríguez-García's letters to the mayor, the record contains additional evidence that the mayor was aware of the Ethics Office investigation, her claim of retaliatory transfer, and her request for reinstatement. Sometime after Rodríguez-García testified before the Ethics Office in December 1999, Flores informed Miranda-Marín that she had been summoned by the Ethics Office, and the mayor offered to help her secure legal representation. In September 2000, Rodríguez-García confronted the mayor in a public square, grabbed him, and asked what he intended to do about her case. In October 2000, Rodríguez-García filed a lawsuit against the municipality in Superior Court, alleging that her transfer and nonreinstatement were in retaliation for her Ethics Office complaint. Shortly thereafter, the mayor commented on Rodríguez-García's lawsuit in a television interview.[14] Although the mayor testified at trial that he remained unaware of Rodríguez-García's

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[14] Miranda-Marín asserted that the lawsuit was part of a scheme by Rodríguez-García's lawyer, who had appeared in an earlier political commercial against the mayor, and that Rodríguez-García was related to Carrasquillo, who allegedly had a personal agenda against the mayor.

employment situation or the subject of her complaint despite these events, the jury was free to reject that testimony.

Thus presented, the evidence adduced at trial is sufficient to sustain the imposition of § 1983 liability on the mayor for his own direct acts or omissions with respect to Rodríguez-García's nonreinstatement. *See id.* A reasonable jury could find that Miranda-Marín had knowledge of the Ethics Office investigation, had knowledge of Rodríguez-García's claim that she was transferred and deprived of duties in retaliation for her testimony before the Ethics Office, and received her repeated requests for reinstatement. Moreover, as mayor, Miranda-Marín had final authority over transfers and reinstatements of municipal employees. Nevertheless, the mayor declined to reinstate Rodríguez-García to her position in Public Works in response to her repeated requests.

4. Liability of the Municipality

As with government officials, a municipality cannot be held liable for the constitutional violations of municipal employees on a *respondeat superior* theory. *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). Instead, liability attaches to a municipality under § 1983 "only if the violation occurs pursuant to an official policy or custom." *Welch* v. *Ciampa*, 542 F.3d 927, 941 (1st Cir. 2008). A plaintiff can establish an official policy "by showing that the alleged constitutional injury was caused by . . . a person with final

policymaking authority." *Id.*; *see also Rodríguez II*, 495 F.3d at 13 ("It is well established that the deliberate acts or omissions of a municipal policymaker with final authority over the subject matter in question may expose the municipality itself to liability."). Although liability may not be imposed on a municipality for a single instance of misconduct by an official *without* final policymaking authority, liability may be imposed on a municipality for "a single decision by a final policymaker." *Welch*, 542 F.3d at 942 (citing *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 480 (1986)).[15]

We have recognized on a number of occasions that "mayors in Puerto Rico are the government officials ultimately responsible for employment decisions of the municipality." *Rodríguez II*, 495 F.3d at 13 (quotation marks and citations omitted); *see also Acevedo-Garcia* v. *Monroig*, 351 F.3d 547, 553 n.1 (1st Cir. 2003) (noting that under Puerto Rico law, mayors of municipalities have the power to appoint and remove municipal officials and employees, and thus mayor's "employment decisions ipso facto constituted the official policy of the municipality" (internal quotation marks and citation omitted)). Therefore, liability can be imposed on the municipality for

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[15] Relying on our decision in *Fabiano* v. *Hopkins*, 352 F.3d 447 (1st Cir. 2003), defendants suggest that a single incident of misconduct cannot expose a municipality to § 1983 liability. We squarely rejected this same argument in *Welch*. *See* 542 F.3d at 942.

Miranda-Marín's own direct acts or omissions with respect to Rodríguez-García.[16]

C. Requested Jury Instruction as to Vice Mayor Puig

Recounting what happened in the first jury trial in this case, defendants contend that the court erroneously declined to instruct the jury in the second trial that Vice Mayor Puig had not taken an adverse employment action against Rodríguez-García. Following that first trial, in which Puig and the municipality were defendants, the jury rejected Rodríguez-García's claim that the vice mayor had taken an adverse employment action against her. Presented with a special jury verdict form that asked, "Did Plaintiff establish by preponderance of the evidence that defendant Wilfredo Puig took adverse employment action against her?", the jury answered in the negative. Prior to the second trial, defendants Miranda-Marín and the municipality invoked collateral estoppel and moved that the court instruct the jury that Puig took no adverse employment action against

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[16] Defendants further contend that the mayor is entitled to qualified immunity because he did not cause any violation of a constitutional right. In support of this position, defendants simply reiterate their contentions that Rodríguez-García was transferred based on her own request and not in retaliation for her Ethics Office testimony and that the mayor had no knowledge of her transfer and request for reinstatement. As discussed above, ample evidence supports a jury finding to the contrary on both of these points.

Rodríguez-García. The court denied the motion in limine in a thorough written order, concluding that the requested instruction would likely confuse and unduly influence the jury and would not promote judicial economy because closely related issues remaining in the case would require that much of the same evidence be presented to the jury.

Collateral estoppel, now often called issue preclusion, prevents a party from relitigating issues that have been previously adjudicated. *Enica* v. *Principi*, 544 F.3d 328, 336 (1st Cir. 2008). The doctrine serves the twin goals of "protecting litigants from the burden of relitigating an identical issue" and "promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979). Collateral estoppel may be applied where "(1) the issue sought to be precluded in the later action is the same as that involved in the earlier action; (2) the issue was actually litigated; (3) the issue was determined by a valid and binding final judgment; and (4) the determination of the issue was essential to the judgment." *Ramallo Bros. Printing, Inc.* v. *El Dia, Inc.*, 490 F.3d 86 (1st Cir. 2007).

In the past, courts "adhered to the doctrine of 'mutuality of estoppel,' which ordained that 'unless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (nor his privy) in the second action may use the prior judgment as determinative of an issue in a second action.'" *Acevedo-Garcia*, 351 F.3d at 573 (quoting *Blonder-Tongue Labs.* v. *Univ. of Ill. Found.*, 402 U.S.

313, 320-21 (1971)). However, mutuality is no longer strictly required for the application of collateral estoppel in federal courts. *Fiumara* v. *Fireman's Fund Ins. Cos.*, 746 F.2d 87, 92 (1st Cir. 1984). Instead, the central question is "whether a party has had a full and fair opportunity for judicial resolution of the same issue." *Id.* Nonmutual collateral estoppel may be invoked either offensively, by a plaintiff who "seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party," or, as in this case, defensively, by a defendant who "seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant." *Parklane Hosiery,* 439 U.S. at 326 n.4; *see id.* at 329-32. We have also recognized that collateral estoppel is "no longer limited to ultimate issues: necessary *intermediate* findings can now be used to preclude relitigation." *Biggins* v. *Hazen Paper Co.*, 111 F.3d 205, 210 (1st Cir. 1997); *see also* Restatement (Second) of Judgments § 27, cmt. j (1982).

Rodríguez-García makes two arguments in support of the court's decision not to apply collateral estoppel. First, she argues that collateral estoppel cannot be applied in this case because the parties in the two proceedings were not identical. This argument is foreclosed by the precedent permitting defensive nonmutual collateral estoppel. Second, Rodríguez-García argues that the issue litigated and decided in the first trial, whether *Vice Mayor Puig* took an adverse employment action against her, is

not the same as the issue to be decided in the second trial, whether *Mayor Miranda-Marín* is personally liable for the alleged retaliation.

As we explained in *Rodríguez II,* Miranda-Marín could be held liable either based on his own "direct acts or omissions," that is, his direct participation in the unconstitutional conduct, or based on his indirect "condonation or tacit authorization" of unconstitutional conduct by his subordinates. 495 F.3d at 10 (internal quotation marks omitted); *see also Whitfield* v. *Meléndez-Rivera,* 431 F.3d 1, 14 (1st Cir. 2005). A finding of liability under the former theory, that Miranda-Marín directly participated in the refusal to reinstate Rodriguez-Garcia, would not depend in any way on whether the vice mayor took an adverse employment action against her. However, a finding of liability under the latter theory, that Miranda-Marín condoned or tacitly authorized an adverse employment action taken by a subordinate such as Vice Mayor Puig, could require the jury to decide precisely the same issue that was decided by the jury in the first trial – whether the vice mayor took an adverse employment action against Rodríguez-García.

Here, although the special verdict form used in the second trial does not indicate whether the jury found Miranda-Marín liable on a direct or indirect theory of liability, we can be reasonably sure that the jury found the mayor liable on a direct liability

theory.[17] Rodríguez-García's theory of liability at the second trial was that Miranda-Marín was directly involved in her nonreinstatement, not that the mayor condoned or tacitly authorized any alleged adverse action by Puig. She offered evidence that Miranda-Marín had the ultimate authority to transfer and reinstate municipal employees, knew that she had been transferred in retaliation for her Ethics Office complaint, knew of her repeated requests for reinstatement, and nevertheless refused to reinstate her. She did not offer any evidence that Puig received her requests for reinstatement or was involved in the decision not to reinstate her. As the trial court

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[17] The special verdict form used in the second trial asked the jury whether they found "by a preponderance of the evidence that plaintiff's transfer, or failure to be reinstated, resulted from Mayor William Miranda Marín's direct acts or omissions, or from his indirect conduct that amounted to condonation or tacit authorization." Thus, the verdict form does not indicate whether the jury found the mayor liable on a direct or indirect theory of liability. Where a general verdict or special verdict question encompasses multiple claims or multiple theories of liability, one of which is unsupported by the evidence or otherwise defective, "a new trial is usually warranted." *See Mass. Eye & Ear Infirmary* v. *QLT Phototherapeutics, Inc.*, 552 F.3d 47, 73 (1st Cir. 2009); *see also David* v. *Rennie*, 264 F.3d 86, 105-06 (1st Cir. 2001). However, this rule is "by no means rigid;" instead, "we apply a generous harmless error analysis in order to determine whether it is reasonably likely that the jury in fact relied on a theory with adequate evidentiary support." *Mass. Eye & Ear*, 552 F.3d at 73. Rodríguez-García's evidence and argument at trial focused entirely on a direct rather than an indirect theory of liability. Therefore, it is reasonably likely that the jury relied on a direct theory of liability, a theory amply supported by the evidence.

explained in its order denying defendants' motion for a new trial:

> Defendants overstate the importance of Puig's actions as they relate to plaintiff's theory of the case as it was presented through evidence in the second trial. . . . Although there was evidence (elicited mainly by the defendants) that Puig authorized plaintiff's initial transfer in February 2000, no evidence was presented that Puig received any of plaintiff's requests for reinstatement, or that he was involved in any decision not to reinstate her from February 2000 until early 2003; rather, the evidence presented at trial indicated that all such requests were made to Miranda-Marín and were referred to the head of Human Resources.

Rodríguez-García's opening and closing arguments similarly focused on the mayor's direct participation in Rodríguez-García's nonreinstatement, rather than any indirect authorization of alleged adverse actions by Puig. Thus, a finding of liability under the theory Rodríguez-García pressed at the second trial, that the mayor was directly involved in the decision not to reinstate her, is consistent with the jury verdict in favor of Puig in the first trial.

Moreover, "[n]onmutual issue preclusion is not available as a matter of right." 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4465 (2d ed. 2010). Instead, a district court may refuse to apply nonmutual collateral estoppel when, for example, its application

"would badly distort matters" before the jury, *Biggins*, 111 F.3d at 210 (citing Federal Rule of Evidence 403), or would "not result in efficiency gains because litigation of the 'live' issue may require introduction of some of the same evidence pertinent to the estopped issues," *Acevedo-Garcia*, 351 F.3d at 577. Although, as defendants point out, *Biggins* and *Acevedo-Garcia* involved offensive nonmutual collateral estoppel, concerns about juror confusion and judicial economy are relevant to defensive nonmutual collateral estoppel as well. *See* 18A Wright, Miller & Cooper, *supra*, at § 4465 ("Whatever values may be gained by nonmutual preclusion are substantially diminished when the need to try related issues requires consideration of much the same evidence as bears on the issue tendered for preclusion. . . . Beyond the lack of time saving, moreover, preclusion on one issue while closely related issues must be tried may substantially distort decision of the issues that remain open." (footnote omitted)); Restatement (Second) of Judgments § 29(6).

The district court carefully weighed the merits of the requested jury instruction and concluded that it was not appropriate in this case. Citing Federal Rule of Evidence 403, the court found that the requested instruction could lead the jury to make improper inferences as to related issues remaining in the case, such as whether Rodríguez-García's transfer or nonreinstatement constituted an adverse employment action, whether she was transferred at her own request rather than in retaliation for her protected

activity, and whether municipal actors other than the vice mayor took an adverse employment action against her. The court further found that the instruction would not promote judicial economy because these remaining, closely intertwined issues would require introduction of much of the same evidence at trial. In view of the court's well-supported concerns about juror confusion and judicial economy, we conclude that the court did not err in refusing to instruct the jury that Vice Mayor Puig had not taken an adverse employment action against Rodríguez-García.

D. Damages

Finally, defendants argue that the trial court erred in declining to reduce the damages award, asserting that the award was grossly excessive. The jury awarded Rodríguez-García $350,000 in compensatory damages for her emotional pain and suffering.

We may overturn a damages award only if it is "grossly excessive or so high as to shock the conscience of this court." *Valentín-Almeyda,* 447 F.3d at 103. We accord "broad discretion to the trial court's decision to affirm the jury's award of damages because of that court's greater familiarity with local community standards and with the witnesses' demeanor at the trial." *Id.* (quotation marks and citation omitted). Damages for pain and suffering, in particular, "defy exact mathematical computation and are not susceptible to proof by a dollar amount."

Acevedo-Garcia, 351 F.3d at 571 (internal quotation marks and citations omitted).

At trial, Rodríguez-García and her psychiatrist, Dr. Julio Fontanez, testified at length about the suffering she endured as a result of her transfer and nonreinstatement. Rodríguez-García explained that the lack of duties in her new position made her feel "very bad," "depressed," "like I was nothing, like I wasn't there. . . . I continued being Executive Secretary 1, but I wasn't that. In practice, I wasn't that. And they let me know that everyday, having me there." The transfer affected her home life as well, causing her to "withdr[a]w from my family, from my children, my daily life. From my mother, my family. I wanted to be alone, withdrawn, just thinking. . . . I tried to get away . . . from what was me."

Dr. Fontanez, who treated Rodríguez-García from July 1997 until December 2002, testified that her psychological condition deteriorated over this period. Although Rodríguez-García had typical symptoms of depression as of 1997, over time her condition grew "more acute," requiring increased medication and, beginning in June 2000, repeated hospitalizations. Fontanez testified to Rodríguez-García's recurring complaints about her work situation after the transfer, and identified that situation as an important factor in her deteriorating condition.

In light of this evidence, we cannot say that the court abused its discretion in affirming the damages award. Although generous, the award of $350,000

was not grossly excessive or so high as to shock the conscience. Moreover, this award is similar to non-economic compensatory damages awards we have upheld in other employment discrimination and retaliation contexts. *See, e.g., Monteagudo* v. *Asociación de Empleados del Estado Libre Asociado de P.R.*, 554 F.3d 164, 174-75 (1st Cir. 2009) (upholding $333,000 damages award in sexual harassment case where plaintiff testified that she suffered from depression, cried every evening and was unable to sleep); *McDonough* v. *City of Quincy*, 452 F.3d 8, 22 (1st Cir. 2006) (affirming $300,000 damages award in Title VII retaliation case, "the bulk" of which was for emotional distress in the form of humiliation and damage to reputation and family relationships).

III.

In her cross-appeal, Rodríguez-García contends that the court erred in concluding that she waived her claim under Law 115. Law 115 prohibits an employer from discriminating against an employee for offering testimony before a legislative, administrative or judicial forum in Puerto Rico and, importantly, provides for double damages for a violation of this provision. 29 P.R. Laws Ann., tit. 29, § 194a(a), (b).

Following our decision in *Rodríguez II* remanding the case for a new trial against the mayor and municipality, Rodríguez-García raised a Law 115 claim in the joint proposed pretrial order ("2007 pretrial

order"). Defendants objected, arguing that she had waived this claim by failing to include it in the joint pretrial order filed by the parties and approved by the court prior to the first trial ("2004 pretrial order"). The court concluded that Rodríguez-García could proceed to trial on her Law 115 claim, and it subsequently doubled the $350,000 compensatory damages award pursuant to that provision. However, on defendants' post-judgment motion to alter or amend the judgment under Rule 59(e), the court determined that its prior ruling was in error. In a written order, the court thoroughly analyzed the record and concluded that Rodríguez-García had waived her Law 115 claim by not including it in the 2004 pretrial order or successfully moving to modify the order, and she had not shown any manifest injustice that would result from not permitting her to modify the 2004 pretrial order to include this claim. The court then entered an amended judgment in the amount of $350,000.

We review the court's decision on a Rule 59(e) motion for abuse of discretion. *See Negrón-Almeda* v. *Santiago,* 528 F.3d 15, 25 (1st Cir. 2008). A final pretrial order "is intended to 'control the subsequent course of the action,' and can be modified only 'to prevent manifest injustice.'" *Correa* v. *Hosp. San Francisco,* 69 F.3d 1184, 1195 (1st Cir. 1995) (quoting Fed. R. Civ. P. 16(e)). Therefore, "[a]n appellate court should not lightly relieve a litigant from the condign consequences of its failure to list a theory . . . at that critical stage of the proceedings," *id.,* and "issues not included in the final pretrial order are generally

waived," *id.* (citing *Ramirez-Pomales* v. *Becton Dickinson & Co.*, 839 F.2d 1, 3 (1st Cir. 1988)).

As the court explained in its detailed order granting defendants' Rule 59(e) motion, even assuming that Rodríguez-García's complaint adequately raised a Law 115 claim,[18] she waived that claim by failing to include it in the 2004 proceedings. In the 2004 pretrial order, Rodríguez-García raised several claims arising under Puerto Rico law,[19] but did not assert a Law 115 claim and did not request double damages. Defendants noted this omission, stating in the pretrial order that Rodríguez-García had not sought a remedy under Law 115. Thereafter, Rodríguez-García made no objection to the language of the 2004 pretrial order and did not seek to modify the order prior to the first trial. Furthermore, at the

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[18] Rodríguez-García's complaint contained one mention of Law 115, invoking supplemental jurisdiction "for causes of action arising under the Puerto Rico Constitution and laws of the Commonwealth of Puerto Rico, among them, Act 115. . . ." However, the complaint's asserted causes of action included several claims arising under Puerto Rico law, but did not include a claim under Law 115. The complaint's prayer for relief likewise did not request double damages under Law 115, although it generally requested "all damages to which [Rodríguez-García] is entitled."

[19] In the 2004 pretrial order, in addition to her federal law claims, Rodríguez-García asserted claims under Article II, §§ 1, 6 and 7 of the Puerto Rico Constitution; the Puerto Rico Public Service Personnel Act, Act No. 5 of Oct. 14, 1975, P.R. Laws Ann., tit. 3, §§ 1301-1323 (repealed Aug. 3, 2004); and Articles 1802 and 1803 of the Puerto Rico Civil Code, P.R. Laws Ann., tit. 31, §§ 5141, 5142.

first trial, the court rejected her attempt to proceed under Law 115. After the close of evidence, Rodríguez-García argued to the court that Law 115's three-year statute of limitations governed the action. However, defense counsel argued that "this is not a Law 115 case" and opposed any attempt by plaintiff to amend her complaint to include a Law 115 claim. The court agreed, ruling that "they are not amending their case to be Law 115."[20]

Rodríguez-García takes issue with the trial court's analysis, contending that she did not waive her Law 115 claim prior to the first trial. She points to statements in the 2004 pretrial order, by the judge during the first trial, and in our opinion in *Rodríguez II,* that refer to her claims under "state law" or "Puerto Rico law." *See, e.g., Rodríguez II,* 495 F.3d at 2, 6. For example, the court instructed the jury in the first trial that plaintiff's claim "under Puerto Rico law" was "identical for all practical purposes to the federal claim," and if the jury found defendants liable under federal law, they would also be liable under Puerto Rico law. However, as noted above, the complaint and the 2004 pretrial order expressly included several claims arising under Puerto Rico law. There is nothing to suggest that the statements Rodríguez-García

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[20] The following day, Rodríguez-García objected to the jury instructions, requesting an instruction under Law 115. The court did not rule on this objection, and Rodríguez-García did not raise the issue again.

points to, which refer generally to state or Puerto Rico law, encompassed Law 115.

In sum, we conclude that the court's determination that Rodríguez-García waived her Law 115 claim, and that its earlier ruling to the contrary was erroneous, was not an abuse of discretion. *See Ruiz Rivera* v. *Pfizer Pharmaceuticals, LLC,* 521 F.3d 76, 81-82 (1st Cir. 2008) (a court may grant a Rule 59(e) motion "where the movant shows a manifest error of law or newly discovered evidence" (quotation marks and citation omitted)).

IV.

For the foregoing reasons, the judgment is *affirmed.* Each party shall be responsible for its own costs.

So ordered.

United States Court of Appeals
For the First Circuit

Nos. 08-2319, 08-2320

CARMEN L. RODRÍGUEZ-GARCÍA,
Plaintiff, Appellee, Cross-Appellant,
v.
WILLIAM MIRANDA-MARÍN,
MUNICIPALITY OF CAGUAS,
Defendants, Appellants, Cross-Appellees,
WILFREDO PUIG, Defendant.

JUDGMENT

Entered: June 21, 2010

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed. Each party shall be responsible for its own costs.

By the Court:

/s/ Margaret Carter, Clerk

cc: Mr. Antonetti-Stutts, Mr. Aldarondo-Girald, Ms. Giron-Anadon, Mr. Valenzuela-Alvarado, Ms. Ramirez-Rangel, Ms. Oliver-Falero, Ms. Maldonado-Rodriguez, Ms. Casalduc-Rabell, Ms. Oronoz-Rodriguez, Ms.

Gonzalez-Negron, Mr. Pabon-Roca, Mr. McCall, Mr. Colon-Alicea, Ms. Latimer-Bengoa, and Mr. Sanchez-Preks.

United States Court of Appeals
For the First Circuit

No. 05-1847

CARMEN L. RODRIGUEZ-GARCIA,

Plaintiff, Appellant,

v.

MUNICIPALITY OF CAGUAS; HON. WILLIAM MIRANDA-MARIN; WILFREDO PUIG, AS VICE MAYOR OF CAGUAS AND IN HIS PERSONAL CAPACITY,

Defendants, Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Gustavo A. Gelpi, U.S. Magistrate Judge]

Before

Lynch, Circuit Judge,
Stahl, Senior Circuit Judge,
and Lipez, Circuit Judge.

Godwin Aldarondo-Girald, for appellant.

Michael Craig McCall, with whom Luis E. Pabon-Roca, Grisselle Gonzalez Negron, and Faccio & Pabon Roca, were on brief for the Municipality of Caguas,

William Miranda-Marin and Wilfredo Puig in their official capacities.

Leticia Casalduc-Rabell, Assistant Solicitor General, with whom Salvador J. Antonetti-Stutts, Solicitor General, Mariana Negron-Vargas, Deputy Solicitor General, and Maite D. Oronoz-Rodriguez, Deputy Solicitor General, were on brief for William Miranda-Marin and Wilfredo Puig in their personal capacities.

July 31, 2007

LIPEZ, Circuit Judge. Appellant Carmen Rodriguez-Garcia, a career employee in the Municipality of Caguas ("the municipality"), claimed that she was transferred from the Public Works Department ("Public Works")[1] to the Office of Federal Funds ("Federal Funds") in violation of the First Amendment and Puerto Rico law. Although she enjoyed the same title and salary in the two positions, Rodriguez-Garcia alleged that the transfer constituted a demotion because she had no significant work responsibilities at Federal Funds. She further alleged that the

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[1] The title of this department – which, in Spanish, is "Limpieza, Ornato y Urbanismo" – is variously translated by the parties as "Beautification," "Ornate," "Cleaning, Beautification and Urbanism," and "Public Works" (among others). We will refer to it as the Public Works Department ("Public Works").

transfer was intended as retaliation because she complained of improper campaign tactics by the mayor and others in the municipal government, sparking an investigation by the Puerto Rico Office of Ethics ("Ethics Office"). Alternatively, she asserted that the transfer, motivated by her political affiliation, was an act of political discrimination.

Prior to trial, the court granted summary judgment to defendants on the political discrimination claim. At trial, Rodriguez-Garcia proceeded against Mayor Miranda Marin and Vice Mayor Wilfredo Puig in their personal and official capacities on her retaliation claim, arguing that their actions supported liability against the municipality based on their final authority over her transfer. The court dismissed the retaliation claim against Mayor Marin as a matter of law at the completion of appellant's case. Although the jury found Vice Mayor Puig not personally liable, it found the municipality liable on the retaliation claim. Finding this jury verdict inconsistent with Rodriguez-Garcia's theory of the case – that the liability of the municipality was contingent on the personal liability of the mayor or the vice mayor – the district court entered judgment as a matter of law for the municipality.

We affirm in part, reverse in part and remand to the district court for further proceedings. Specifically, we affirm the district court's grant of summary judgment to defendants on Rodriguez-Garcia's political discrimination claim. We also affirm the judgment in favor of Vice Mayor Puig on Rodriguez-Garcia's

retaliation claim and the decision of the district court vacating the jury award against the municipality. However, we order a new trial on Rodriguez-Garcia's retaliation claim against Mayor Marin and the municipality because the district court's dismissal of the case against the mayor rested upon an erroneous evidentiary ruling involving the application of Federal Rule of Evidence 408 dealing with "compromise and offers to compromise." That error was not harmless.

I.

A. Factual Background

1. Rodriguez-Garcia's Transfer

Rodriguez-Garcia served as Executive Secretary for the Director of Public Works, Luisa Flores, from 1998 until her transfer in 2000.[2] In that position, she was required to open all incoming mail and enter it into a log. In 1999, Flores began receiving tickets to fundraisers and notices of leadership meetings for the Popular Democratic Party ("PDP"), the party to which both the mayor and Flores belonged. Rodriguez-Garcia suspected that the receipt of this material violated a rule prohibiting the use of government resources to further political campaigns. Nevertheless,

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[2] She worked for two previous Directors before Flores and had been a municipal employee since 1992.

she duly logged the materials and delivered them to Flores.

Rodriguez-Garcia first discussed her concerns with Flores in 1999, but they were ignored. She then contacted a distant relative, Roberto Carrasquillo, who was a municipal assemblyman for the minority Puerto Rican Independence Party, ("PIP"). He confirmed the merit of her concerns and, with her permission, lodged a complaint with the Ethics Office. Rodriguez-Garcia was summoned to the Ethics Office to testify concerning her complaint on December 21, 1999, and she complied.

On February 1, 2000, Flores reprimanded Rodriguez-Garcia in front of her co-workers for failing to perform one of her tasks. Rodriguez-Garcia acknowledges that this reprimand was unrelated to her testimony in the Ethics Office investigation. Upset, Rodriguez-Garcia left the office early and did not return to work the next day. Instead, she spent that day resting and on medication.[3] On February 3, she had a heated conversation with Flores about the missed day of work; shortly after that conversation, she passed out and required medical care. Her doctor advised her to rest, which she did until February 18. On that date, Rodriguez-Garcia delivered a copy of

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[3] Extensive medical testimony at trial established that Rodriguez-Garcia had been prescribed a wide variety of pharmaceuticals over the years to treat recurrent depression and other psychological ills.

her medical release to the Human Resources Office ("Human Resources"). She then went to Vice Mayor Wilfredo Puig's office to discuss the doctor's recommendations and her intention to return to work.

The contents of the conversation between Rodriguez-Garcia and Vice Mayor Puig are hotly contested. According to Rodriguez-Garcia, she told the vice mayor that, despite her doctor's recommendation that she not return to Public Works, she wanted to return because she thought she could work things out with Flores. She testified that Vice Mayor Puig then told her that Flores had showed him a copy of the mail log that Rodriguez-Garcia kept and that the Ethics Office was investigating the use of municipal resources to distribute political propaganda. Apparently unaware that Rodriguez-Garcia had already testified before the Ethics Office on this matter, Vice Mayor Puig suggested that she would be summoned to testify and asked her what she would say. At trial, Rodriguez-Garcia testified: "I told him that I'd tell the truth. That I'd tell the truth because that was my job." According to Rodriguez-Garcia, Vice Mayor Puig told her that "whatever truth I said could affect him, the Mayor and the party, and I told him that I was very sorry, but that was my job." He then told her that "he could no longer count on me." Vice Mayor Puig recalled a very different conversation. He testified that Rodriguez-Garcia requested a transfer out of Public Works and that there was no discussion of the Ethics Office investigation.

Shortly after this meeting, Rodriguez-Garcia was transferred out of her position at Public Works. After initial assignment to the Municipal Education Department, where she had no work to do, she was transferred to Federal Funds. Rodriguez-Garcia claims she did "very little, practically nothing," at Federal Funds because the office already had an Executive Secretary; she alleges that this lack of work was intended to encourage her to quit municipal employment altogether. Rodriguez-Garcia testified that the lack of work made her feel "bad," "uncomfortable," "ashamed," and "depressed," and that it affected her home life: "I locked myself in, within that problem, and I couldn't see beyond [it]. . . . and I forgot that the kids were growing up, that I had a husband, a mom, a family, and that became my life as a whole." In contrast, the Director of Federal Funds, Gilberto Charriez, testified that his office was understaffed and desperate for workers when Rodriguez-Garcia arrived and that she seemed happy in her new position. He also described ordering pizza on busy work nights when Rodriguez-Garcia stayed late with the rest of the staff to meet deadlines, lunches eaten together in a conference room, office Christmas parties and meeting Rodriguez-Garcia's family outside of work on social occasions.

2. Attempts at Reinstatement

Following her transfer, Rodriguez-Garcia sent a letter to Human Resources dated March 3, 2000, requesting a written explanation for her transfer.[4] Her attorney, Eladio Cartagena, followed up on this first letter with three additional letters. The first of these, dated March 8, was directed to the mayor. This letter requested Rodriguez-Garcia's reinstatement to Public Works and suggested that her transfer was motivated by the Ethics Office investigation. Cartagena received a reply from Human Resources dated March 27 that began, "The Hon. William Miranda Marín, Mayor, has referred to us your letter dated March 8, 2000 concerning the transfer of Mrs. [Rodriguez-Garcia]," and stated that: (1) the transfer had been made at Rodriguez-Garcia's request because of differences she had with her direct supervisor; (2) it was considered a temporary transfer; and (3) that "we would have no inconvenience in newly reinstating Mrs. [Rodriguez-Garcia] to her former position." Cartagena sent a second letter to the mayor on April 10, requesting the offered reinstatement.[5] Receiving no response, he penned a third letter on May 31 informing the mayor that, on the basis of the offered reinstatement, Rodriguez-Garcia had met with the interim Human Resources director and the

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[4] The letter indicates that a copy was also sent to Mr. Armando Melendez at Human Resources.

[5] The letter indicates that a copy was also sent to Mr. Heriberto Martinez, Director of the Legal Advisor's Office.

director of Public Works and that they had refused to reinstate her. The May 31 letter also notified the mayor of Rodriguez-Garcia's intention to file a civil action based on Mayor Marin's failure to reinstate her.[6]

Sometime thereafter, Rodriguez-Garcia happened upon the mayor in a public square, where she approached him and asked about the resolu ion of her complaint. According to Rodriguez-Garcia's testimony, she "grabbed him strongly" and asked about her case. He responded "what was my case, what was happening?" Before she could elaborate, she was escorted back to her office by his assistants. Finally, on June 21, 2001, Rodriguez-Garcia wrote to the mayor again, complaining that she lacked significant work responsibilities and was depressed; she entreated him to resolve her complaint and reinstate her to her former position. Rodriguez-Garcia was never reinstated to her position at Public Works.[7]

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[6] For convenience, the three letters written by Rodriguez-Garcia's attorney and sent on her behalf and dated March 8, April 10 and May 31 and the letter from Human Resources dated March 27 will be referred to hereinafter as "the Letters." We distinguish these four letters from any other correspondence related to Rodriguez-Garcia's claims because, as we will discuss, they were the subject of a contested evidentiary ruling.

[7] However, in April 2003, Rodriguez-Garcia was transferred to the Department for Conservation of Buildings and, shortly thereafter, she secured a position as an executive secretary in the Technical Services Division for Maintenance and Energy.

(Continued on following page)

In his testimony as part of the defendants' case, Vice Mayor Puig maintained that he was never informed that Rodriguez-Garcia opposed her transfer after their initial meeting, where he says she requested the change. He was asked: "there are many documents stating that Ms. Rodriguez did not want the transfer, did you know that?" He replied: "They never came to my attention, none of them, stating that she did not want to go."

Armando Melendez, an executive in Human Resources who had met with Rodriguez-Garcia at Vice Mayor Puig's behest, testified that Rodriguez-Garcia expressed her desire not to be transferred during their meeting; however, she called later that same day and said she did want the transfer. Melendez's written report on this meeting, dated February 22, 2000, and submitted as evidence at the trial, supports his testimony.[8]

Finally, Heriberto Martinez, who was director of the Legal Advisor's Office at the time of the transfer, testified that, upon Rodriguez-Garcia's request, he contacted Human Resources to look into her case. In a conversation with Melendez, Martinez was led to believe that Rodriguez-Garcia would be reinstated to

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She testified that she was happily employed in both of these positions.

[8] It states: "Mrs. Rodriguez states she does not want to be transferred; however, during the afternoon she contacts us and tells us she has thought it over and does want the transfer."

her position. Martinez also spoke directly with Vice Mayor Puig, who reiterated that Rodriguez-Garcia had requested her initial transfer. When Martinez reported to Rodriguez-Garcia what he had been told, she reiterated that she wanted to return to Public Works. Rodriguez-Garcia's counsel pressed Martinez on whether Rodriguez-Garcia had said that she did not request the initial transfer, but Martinez would testify only to her statement that she wanted to return to Public Works.

Thus, there is a direct conflict between Rodriguez-Garcia's testimony and the account of the defendants. According to her, she never requested a transfer, and the transfer that was imposed upon her, to an office where she had no responsibilities, was in retaliation for her complaint to the Ethics Office. According to Vice Mayor Puig, Rodriguez-Garcia requested a transfer, supposedly because of her conflict with Flores, and that was the last he heard of her employment predicament. According to Melendez, Rodriguez-Garcia initially requested not to be transferred but later called and requested a transfer. Furthermore, according to her supervisor at Federal Funds, Rodriguez-Garcia joined a busy office that was short-staffed at the time of her transfer and where there was plenty of work to keep her busy.

B. Procedural Background

In October 2000, Rodriguez-Garcia filed a petition in the Superior Court of Puerto Rico seeking an

injunction against the municipality and Luisa Flores, alleging that she had been transferred in retaliation for her Ethics Office complaint, in violation of Puerto Rico law.[9] Rodriguez-Garcia later filed and was granted a voluntary dismissal without prejudice. On November 7, 2001, she filed a new action in federal court against the municipality, Mayor Marin and Vice Mayor Puig, claiming that she had been transferred and demoted on the basis of her political affiliation ("the political discrimination claim") and her involvement in the Ethics Office investigation ("the retaliation claim"), in violation of the First Amendment and Puerto Rico law. She brought her federal law claims under 42 U.S.C. §§ 1981, 1983 and 1985.

Defendants moved for summary judgment on a number of grounds. In an August 2004 opinion and order, the district court granted the motion in part and denied it in part.[10] In particular, the court found that Rodriguez-Garcia had not established a prima facie case of political discrimination under the First Amendment and that her claims under §§ 1981 and

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[9] The petition was later amended to include a political discrimination claim under the First Amendment; the amended petition did not include Flores as a defendant, as she had died in the interim.

[10] Defendants previously had moved for summary judgment on several grounds, including that the statute of limitations had run. The district court granted the motion on that basis, but we vacated the decision in January 2004 and remanded the case for further proceedings. *See Rodriguez-Garcia v. Municipality of Caguas*, 354 F.3d 91 (1st Cir. 2004).

1985 were inapt because she had not alleged any discriminatory action based on race or class.[11] However, the district court found that Rodriguez-Garcia had placed sufficient facts in dispute to warrant a jury trial on the retaliation claim and that these factual disputes foreclosed a ruling at that stage on the mayor's and vice mayor's claimed entitlement to qualified immunity. Motions and cross-motions for reconsideration were filed and denied.

Before the trial commenced, defendants filed a motion in limine to exclude the testimony of several witnesses and the Letters under Federal Rule of Evidence 408, which excludes "conduct or statements made in compromise negotiations regarding" a "claim that was disputed." Fed. R. Evid. 408(a)(2), (a). The court denied the motion as to the testimony and allowed the Letters into evidence, but only "for the limited purpose of negating defendants' contention that plaintiff herself requested a transfer."

At the close of the plaintiff's case, Mayor Marin requested and was granted judgment as a matter of

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[11] 42 U.S.C. § 1981 states, in pertinent part, that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." Section 1985(3) provides a damages remedy in the event that "two or more persons . . . conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws." The court found that Rodriguez-Garcia's claim did not fit within the language of either statutory section. Rodriguez-Garcia does not appeal these rulings.

law in his personal capacity under Federal Rule of Civil Procedure 50(a). Noting that the Letters could not be relied upon as evidence of the mayor's notice of her claim because of the limited ground of their admission, the court explained that the remaining evidence, "[a] mere letter of protest and request [to Human Resources] for investigation which [was] ignored by a supervising authority,"[12] was insufficient as a matter of law to establish that the mayor knew of Rodriguez-Garcia's employment situation and thus he could not be found liable for any participation in her transfer and lack of reinstatement.

At the trial's conclusion, the jury rejected Rodriguez-Garcia's claim that Vice Mayor Puig had taken an adverse employment action against her. However, it did find that she had established municipal liability for that adverse employment action and awarded her $285,000.00 in damages. In response to the municipality's motion, the court granted judgment as a matter of law under Federal Rule of Civil Procedure 50(b), finding the jury's verdict inconsistent with Rodriguez-Garcia's theory of the case. The court denied Rodriguez-Garcia's motion to vacate judgment and, alternatively, for a new trial, and she proceeded with this appeal.

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[12] The court is referring to Rodriguez-Garcia's March 3 letter to Human Resources requesting a written explanation for her transfer. This letter was not excluded under the court's Rule 408 ruling.

Rodriguez-Garcia challenges each of the district court's dispositive rulings: (1) the grant of summary judgment for defendants on her political discrimination claim; (2) the grant of the Rule 50(a) motion dismissing the case against Mayor Marin in his personal capacity; and (3) the decision to grant judgment as a matter of law to the municipality. She also challenges the jury verdict in favor of Vice Mayor Puig. With respect to the municipality, she contends that either the jury verdict should be restored or that she is entitled to a new trial on her claim against Mayor Marin, Vice Mayor Puig and the municipality. She insists that the verdict in favor of Vice Mayor Puig was against the weight of the evidence.

II.

A. The Political Discrimination Claim

We review the grant of summary judgment on the political discrimination claim de novo, drawing all reasonable inferences in favor of Rodriguez-Garcia. *Aguiar-Carrasquillo* v. *Agosto-Alicea,* 445 F.3d 19, 25 (1st Cir. 2006). As a necessary element of establishing a prima facie case of political discrimination, a plaintiff must show that party affiliation or advocacy of political ideas was a substantial or motivating factor behind the challenged employment action. *Peguero-Moronta* v. *Santiago,* 464 F.3d 29, 45 (1st Cir. 2006).

The district court granted summary judgment to defendants because it found that "plaintiff's fluid political affiliation makes it difficult for the Court to

find that defendants were well aware and motivated by her alleged support for the [party in opposition to the mayor's party]." Indeed, Rodriguez-Garcia testified at her pre-trial deposition that, while she claims to be a member of the PIP, she voted for candidates from several parties in the 2000 elections.[13] She also admitted that she acted as an electoral college official for the mayor's party, the PDP, in the 1996 elections.

On appeal, Rodriguez-Garcia does not contest the court's characterization of her partisan affiliation; rather, she attempts to shift the basis of her political discrimination claim from political affiliation to political speech. However, this attempt at recharacterization makes her political discrimination claim indistinguishable from her retaliation claim, which focuses on the defendants' reaction to her discussions with the Ethics Office. As presented to the district court at the time of its summary judgment ruling, her political discrimination claim was dependent upon establishing that defendants were aware of and motivated by her political affiliation. We agree with the district court that the plaintiff did not establish a genuine issue of material fact on the relationship between her transfer and her political affiliation. We therefore affirm the district court's grant of summary judgment for defendants on this claim.

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[13] We limit our review to the record as it stood before the district court when it granted summary judgment. *See J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1250 (1st Cir. 1996).

B. Reinstatement of the Jury Verdict

Rodriguez-Garcia urges us to reinstate the jury's verdict against the municipality, arguing that the court erred when it found the verdict inconsistent with her theory of the case. The district court characterized Rodriguez-Garcia's case as depending on retaliation taken against her by Mayor Marin and Vice Mayor Puig, as parties with "final authority" to bind the municipality. Since the claim against the mayor had already been dismissed, the court viewed municipal liability as contingent upon Vice Mayor Puig's liability. Therefore, the jury's rejection of the claim against Vice Mayor Puig made municipal liability inconsistent with Rodriguez-Garcia's theory of the case.

On appeal, Rodriguez-Garcia argues that the jury could have based municipal liability on the actions of a conspiracy of municipal workers, including but not limited to Vice Mayor Puig. Seen through the lens of this alternative theory, the jury's verdicts are not necessarily inconsistent, and the judgment against the municipality should be reinstated.[14]

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[14] Although it is not entirely clear, Rodriguez-Garcia's brief also could be read to allege a theory of liability arising from the municipality's general custom or practice of retaliating against workers who voice complaints against the mayor's party. Her brief cites *Monell*, 436 U.S. at 691, which holds that municipalities can be found liable under 42 U.S.C. § 1983 when either official policy or " 'custom' even though such a custom has not received formal approval through the body's official decisionmaking

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The municipality argues that Rodriguez-Garcia's failure to object to the judge's inconsistency determination before the jury was dismissed bars our review of this issue. We agree. We have followed an "ironclad rule" that a party that fails to raise an objection based on verdict inconsistency before the jury is dismissed waives the issue. *See Wennik* v. *Polygram Group Distribution, Inc.*, 304 F.3d 123, 130 (1st Cir. 2002); *Campos-Orrego* v. *Rivera*, 175 F.3d 89, 98 (1st Cir. 1999); *Toucet* v. *Mar. Overseas Corp.*, 991 F.2d 5, 8 (1st Cir. 1993) (collecting cases). Here we confront the opposite situation: Rodriguez-Garcia failed to specifically voice her opinion that the verdict was consistent before the jury was dismissed.

In the typical case, it would be pointless to require a party to assert that a favorable verdict was consistent. However, this is not the typical case. Here, the district court had twice indicated that, if the jury found Vice Mayor Puig not liable and the municipality liable, it would enter judgment for the municipality as a matter of law.

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channels" operates to deprive a plaintiff of her constitutional rights. Such a theory was not developed in the district court and therefore is not available on appeal. At trial, the court specifically stated: "In the pre-trial, I don't have any theory of the plaintiff's that could establish liability against the Municipality that there was a previous pattern, and the Municipality was engaged. . . . That's not a theory that is stated here." Rodriguez-Garcia agreed.

First, after the jury instructions were read, the defense noted that the instructions did not preclude the jury from finding in favor of Vice Mayor Puig but against the municipality. The court responded: "If they don't find [Vice] Mayor Puig liable and for some reason they find the municipality liable . . . the municipality is not liable." Rodriguez-Garcia did not object to this statement at the time; she also failed to object to this statement shortly thereafter, when specifically asked if she had objections to preserve.

Second, after closing arguments, the court gave the parties an opportunity to "represerve" their earlier objections. The defense again raised its concern that the jury instructions allowed for a mixed verdict. The court responded: "Okay, but I told you that if for all purposes they find Mr. Puig not liable, as a matter of law I am going to have the municipality dismissed. So that is not going to be a problem." The defense then stated: "I understand, Your Honor, and I think that we all agree with that matter, the parties agree, the plaintiff agreed also, so no problem." Rodriguez-Garcia again raised no objection on this point, though she preserved other objections.

After the verdict was delivered and the jurors were duly polled, Rodriguez-Garcia again remained silent. The court discharged the jury and then declared that it would enter judgment for the municipality. Although Rodriguez-Garcia finally tried to argue that the jury verdict was consistent, it was too late. By failing to preserve an objection to the court's inconsistent verdict determination before the jury

was discharged, Rodriguez-Garcia has waived her right to argue on appeal that the court erred in that determination. *See Torres-Arroyo* v. *Rullan*, 436 F.3d 1, 6 (1st Cir. 2006) (finding failure to object before the moment of jury discharge constituted a waiver); *Correia* v. *Fitzgerald*, 354 F.3d 47, 57 (1st Cir. 2003) (holding that a failure to object to an alleged inconsistency while the jury is still empaneled constituted waiver).

C. Arguments for a New Trial

Rodriguez-Garcia argues that, in the event we decline to reinstate the verdict against the municipality, we should grant her a new trial against all parties, claiming that the district court erred in dismissing the claims against Mayor Marin and that a new trial is warranted against Vice Mayor Puig because the jury verdict in his favor was against the weight of the evidence.

1. Dismissal of the Case Against Mayor Marin

The court dismissed the claims against Mayor Marin in his personal capacity, finding that, while the "Mayor can in principle be held liable under a theory of failing to act or take necessary steps to remedy [her] predicament," Rodriguez-Garcia had not provided sufficient evidence to establish that the mayor was aware of her situation. Municipal officials may only be held liable under § 1983 in their personal capacity if the plaintiff can establish that her constitutional

injury resulted from the direct acts or omissions of the official, or from indirect "conduct that amounts to condonation or tacit authorization." *Whitfield* v. *Melendez-Rivera*, 431 F.3d 1, 14 (1st Cir. 2005). On either theory, the plaintiff must show that the official had actual or constructive notice of the constitutional violation. *See Lipsett* v. *Univ. of P.R.*, 864 F.2d 881, 902 (1st Cir. 1988) ("An important factor in making the determination of liability is whether the official was put on some kind of notice of the alleged violations, for one cannot make a 'deliberate' or 'conscious' choice to act or not to act unless confronted with a problem that requires the taking of affirmative steps." (quoting *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 483-84 (1986))).

In seeking to convince the court that the mayor knew of her employment situation, Rodriguez-Garcia relied principally on the Letters, particularly the March 27 letter from Human Resources suggesting that the mayor had referred her claim to its attention. Rejecting this argument, the court noted that it had admitted the Letters for the limited purpose of establishing that Rodriguez-Garcia did not request a transfer from Public Works and thus the Letters could not be used to establish the mayor's knowledge of her situation. With the Letters excluded, the court found that the remaining evidence was insufficient to establish that the mayor was aware of her situation and hence had any direct or indirect involvement in her transfer, lack of reinstatement, or minimal work assignments.

We review the court's Rule 50(a) ruling de novo, viewing the evidence in the light most favorable to Rodriguez-Garcia. *DiRico* v. *City of Quincy*, 404 F.3d 464, 468 (1st Cir. 2005). However, because that ruling depends upon the correctness of the court's decision to limit the admissibility of the Letters, we must first evaluate the court's evidentiary ruling, which we review for abuse of discretion. *See Pelletier* v. *Main St. Textiles, LP*, 470 F.3d 48, 52 (1st Cir. 2006).

a. Admission of the Letters for a Limited Purpose

In their motion in limine, appellees argued that the Letters should be excluded under Federal Rule of Evidence 408, which prohibits the use of "statements made in compromise negotiations regarding the claim" as evidence of a party's "liability for . . . a claim that was disputed as to validity or amount." Fed. R. Evid. 408(a)(2), (a). At a hearing on the motion, the court initially stated:

> [I]t is my impression that these do not fall under Rule 408. . . . These are the sort of letters that when anything happens regarding personnel, the attorney starts to write the agency to put them on notice. The agency, the municipality in this case, will respond, 'We've noted your letter. We are going to look into this.' Then . . . the attorney will say, 'Oh, you have done this or you haven't done that.'

Although the court seemed inclined to reject defendants' arguments that the Letters were covered by

Rule 408, Rodriguez-Garcia's attorney began her arguments against the motion in limine by focusing on an exception to Rule 408 that allows evidence offered for a purpose other than showing liability. Specifically, she argued that "[t]he letters [were] being introduced into evidence for the limited purpose of proving that defendants in fact knew that Ms. Rodriguez[-Garcia] did not want the transfer and that they were aware that she did not want the transfer."

Despite this inauspicious beginning, Rodriguez-Garcia's attorney's arguments developed over the course of the hearing on the motion. By the end, she clearly contested the relevance of Rule 408 to the Letters. Indeed, just before the court announced that it would recess to deliberate, her attorney urged the court to examine the four Letters together:

> You cannot look at each letter individually. . . . You see, Mr. Cartagena directed a letter to the mayor. And the mayor, and very wisely by his counsel, is trying to take himself out of the picture saying it has nothing to do with me, I didn't exercise any action, I didn't do anything, I didn't sign the letter, I didn't send the letter. But you read [the letter from Human Resources], the first thing that it says is, 'The Honorable William Miranda Marin, Mayor, has referred to us your letter dated March 8, 2000, concerning the transfer of Ms. Rodriguez.' *This is evidence of liability against the mayor.* (Emphasis added).

Defense counsel responded: "That's why [Rule] 408 does not permit the letter to come into evidence." Rodriguez-Garcia's attorney countered: "This letter is not an admission. . . . It is not a compromise. Read it." Thus, by the end of the hearing, the court was on notice that Rodriguez-Garcia intended to use the Letters as proof of the mayor's liability and not merely as evidence that she did not request her transfer. Nonetheless, in a written ruling after the recess, the court "[a]ssume[d] that the communications at issue [were] indeed compromise related" and it admitted the Letters "for the limited purpose of negating defendants' contention that plaintiff herself requested a transfer."

This limitation, erroneous as a matter of law, was an abuse of discretion. *See Charlesbank Equity Fund II* v. *Blinds To Go, Inc.*, 370 F.3d 151, 158 (1st Cir. 2004) (noting that legal error always constitutes abuse of discretion). The court's initial impression that these letters do not fall under Rule 408 was correct. These Letters cannot reasonably be viewed as "statements made in compromise negotiations regarding [a] claim" that was in dispute. Fed. R. Evid. 408(a)(2). The March 8 letter from Rodriguez-Garcia's attorney to the mayor's office served the purpose of giving the defendants notice of a claim. Indeed, appellees acknowledged that Rodriguez-Garcia's attorney had to write such a letter to comply with local prelitigation notice requirements. The March 27 letter from Human Resources, which said that "The Hon. William Miranda Marín, Mayor, has referred to us

your letter dated March 8, 2000 concerning the transfer of Mrs. [Rodriguez-Garcia]," simply acknowledged that notice of the claim had been received and expressed the willingness of Human Resources to grant Rodriguez-Garcia's request for reinstatement.

Although Human Resources disputed a factual matter (that Rodriguez-Garcia had not requested a transfer), that disagreement did not affect their willingness to grant to her, without qualification or condition, the reinstatement that she sought. With Rodriguez-Garcia receiving in this letter exactly what she wanted, it could easily be thought there were no "compromise negotiations" taking place in this exchange of correspondence within the meaning of Rule 408. *See, e.g.,* Merriam-Webster's Collegiate Dictionary 984 (10th ed. 1998) (defining "compromise" as "a settlement of differences . . . reached by mutual concessions."); *see also Sandlin* v. *Shapiro & Fishman,* 919 F. Supp. 1564, 1569 (D. Fla. 1996) (finding that letters whose contents offered no concessions did not meet the definition of "compromise" and thus were outside the scope of the state analog to Rule 408). Relatedly, the statement at issue here ("The Hon. William Miranda Marin, Mayor, has referred to us your letter dated March 8, 2000, concerning the transfer of Mrs. Rodriguez") is not the kind of statement that one would be reluctant to make to a potential adversary in an effort to reach an agreement about a dispute without the protection of Rule 408. Indeed, if a stand-alone letter of acknowledgment had been written confirming receipt and noting that the

mayor's office had referred the claim to Human Resources, there is no question that the letter would have been admissible as evidence of notice to the mayor of Rodriguez-Garcia's claim. Thus, admitting this evidence complies with both the letter and spirit of Rule 408.

The second letter from Rodriguez-Garcia's attorney to the mayor, dated April 10, simply reiterated the request for the transfer. When no reinstatement was forthcoming, her attorney sent a third letter dated May 31, 2000 announcing his intention to file a lawsuit. These letters too are outside the ambit of Rule 408. Therefore, Rodriguez-Garcia should have been permitted to use the Letters as evidence that the mayor personally had notice of her claims, an indispensable element of her theory of liability, rather than simply as evidence that she had not requested a transfer from Public Works.

b. Harmless Error

It is a short step from the determination that the district court erred in its decision to limit the admissibility of the Letters to a determination that it erred in granting the mayor judgment as a matter of law. The district court, having excluded the Letters, determined that the remaining evidence – the March 3 complaint letter Rodriguez-Garcia sent to Human

Resources[15] and the encounter between Rodriguez-Garcia and the mayor in a public square – was insufficient to establish supervisory liability. The court explained: "'[i]f mere receipt of a letter or similar complaint were enough, without more, to constitute personal involvement, it would result in liability merely for being a supervisor, which is contrary to the black-letter law that [§] 1983 does not impose respondeat superior liability.'" (quoting *Johnson* v. *Wright,* 234 F. Supp. 2d 352, 363 (S.D.N.Y. 2002)). Given the state of the record that prompted this observation, we understand the court's reference to the "mere receipt of a letter" to be a reference to the March 3 letter to the acting director of Human Resources.

We appreciate the reluctance to permit a jury to draw an inference about the personal involvement of the mayor on the basis of a letter sent to a department head. However, if the court had correctly admitted the Letters as evidence of the mayor's knowledge of Rodriguez-Garcia's complaint and his personal involvement in dealing with it, the court could no longer maintain that Rodriguez-Garcia was attempting to establish the mayor's liability based simply on his role as the supervisor of a department head. Instead, she would have had a basis for arguing that the mayor knew about and was directly involved in

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[15] While the March 3 letter indicated that a copy was sent to the vice mayor, it does not mention the mayor.

the disposition of her transfer and the failure to remedy it. Although appellees argue strenuously that there was no evidence that the mayor personally received the Letters sent to him, this is a factual question appropriate for jury determination.

Moreover, because the district court erred in dismissing the case against the mayor in his personal capacity, it also improperly hindered Rodriguez-Garcia's case against the municipality. It is well established that the deliberate acts or omissions of a municipal policymaker with final authority over the subject matter in question may expose the municipality itself to liability. *See Pembaur,* 475 U.S. at 481-83 (explaining that municipal liability can be found on a plaintiff's showing of a "deliberate choice to follow a course of action [ ] made . . . by the official or officials responsible for establishing final policy with respect to the subject matter in question"). We have repeatedly recognized that "mayors in Puerto Rico are the government officials ultimately responsible for the employment decisions of the municipality." *Rivera-Torres* v. *Ortiz Velez,* 341 F.3d 86, 103 (1st Cir. 2003); *see also Cordero* v. *De Jesus-Mendez,* 867 F.2d 1, 7 (1st Cir. 1989). If Rodriguez-Garcia could establish the mayor's liability in his personal capacity, she would have a plausible argument for municipal liability as well. Under these circumstances, the limited relevance accorded by the district court to the Letters on the basis of Rule 408 was not a harmless error.

2. The Verdict in Favor of Vice Mayor Puig

Rodriguez-Garcia also urges us to overturn the verdict in favor of Vice Mayor Puig, arguing that the jury could not have made a credibility determination in favor of Vice Mayor Puig given the weight of the evidence suggesting that Rodriguez-Garcia had consistently opposed her transfer. We disagree.

The question of Vice Mayor Puig's liability turned largely on whether the jury credited Vice Mayor Puig's or Rodriguez-Garcia's testimony concerning the conversations that allegedly took place between them. Indeed, Rodriguez-Garcia's closing argument featured a series of rhetorical questions, asking:

> Who do you believe? You heard Carmen, but no, the Vice Mayor tells us that on February 18th Carmen Rodriguez requested a transfer to Federal Funds. Who hears him? Who remembers? . . . Who do you believe? . . . Shall we believe Wilfredo Puig, who very conveniently remembers that Carmen requested to go to Federal Funds . . . Should we believe Wilfredo Puig, that conveniently understood that Carmen had no hospitalizations after getting to Federal Funds? . . . Who will we believe? Wilfredo Puig, who again, understood that he could testify as to assigned personnel action, that he later stipulated that did not exist, and that he later admitted that he had never seen. Who do we believe? What happened on February 18th, what?

Assessing witness credibility is "within the unique province of the jury." *United States* v. *Thomas*, 467 F.3d 49, 55 (1st Cir. 2006). We will not disturb its verdict in favor of Vice Mayor Puig.

III.

For the reasons set forth above, we affirm the district court's grant of summary judgment for defendants on Rodriguez-Garcia's political discrimination claim. We also reject Rodriguez-Garcia's request that we order reinstatement of the verdict against the municipality, concluding that Rodriguez-Garcia failed to make the necessary objection before the jury was discharged. However, we find that the court erred when it dismissed the case against the mayor based on its Rule 408 ruling limiting the use of the Letters that were so critical to Rodriguez-Garcia's case. We therefore grant Rodriguez-Garcia's request for a new trial against the mayor and, because municipal liability may be premised upon the mayor's liability, against the Municipality of Caguas, as well. Finally, we decline to disturb the jury's verdict in favor of Wilfredo Puig.

Affirmed in part, reversed in part, and remanded for further proceedings. The parties shall bear their own costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CARMEN RODRIGUEZ-GARCIA Plaintiff v. MUNICIPALITY OF CAGUAS, ET AL Defendants	CIV. NO. 01-2525 (BJM)

OPINION AND ORDER

This case involves plaintiff Carmen Rodríguez-García's claim that she was transferred from her career position as a secretary, and not reinstated to that position, in retaliation for making statements on matters of public concern to the Puerto Rico Office of Ethics ("Ethics Office") in violation of her First Amendment rights as enforceable under 42 U.S.C. §1983 ("Section 1983") and Puerto Rico's Act No. 115, 29 L.P.R.A. §194, *et seq.* After a two-week trial, the jury returned a verdict in favor of plaintiff and against the two remaining defendants (the Municipality of Caguas (the "municipality") and its mayor, William Miranda-Marín) in the amount of $350,000.00 in compensatory damages. The court doubled that amount by operation of Law No. 115. Before the court are defendants' timely motions under Rules 50(b) and 59 for judgment as a matter of law,

for a new trial, and/or for remittitur, and plaintiff's opposition. (Docket No. 283, 288, 299, 302).

I. Motion for Judgment as a Matter of Law after Trial

At the close of plaintiff's case, defendants moved pursuant to Rule 50(a) for judgment as a matter of law. Defendants timely renewed this motion at the close of all of the evidence pursuant to Rule 50(b). Defendants contend that the evidence at trial was insufficient to establish their liability under Section 1983.

In assessing a Rule 50(b) challenge to the sufficiency of evidence to support a jury verdict, the court "must ask whether, viewing the evidence in the light most favorable to the verdict, a rational jury could have found in favor of the party that prevailed." *Bisbal-Ramos v. City of Mayaguez,* 467 F.3d 16, 22 (1st Cir. 2006). The court must not consider the credibility of the witnesses, resolve conflicts in testimony, or evaluate the weight of the evidence, and may overturn the jury's determination only if a reasonable person could not have reached the conclusion of the jury. *Valentín-Almeyda v. Municipality of Aguadilla,* 447 F.3d 85, 95-96 (1st Cir. 2006).

Section 1983 provides in relevant part that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation

of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ." 42 U.S.C. §1983. To prevail in a Section 1983 cause of action, a plaintiff must prove that the act in question occurred "under color of state law" and deprived him/her of rights secured to the plaintiff either by the United States Constitution or by federal law. *Redondo-Borges v. United States HUD*, 421 F.3d 1, 7 (1st Cir. 2005). For purposes of Section 1983, Puerto Rico is deemed equivalent to a state. *Deniz v. Municipality of Guaynabo*, 285 F.3d 142, 146 (1st Cir. 2002).

In this case, Rodríguez-García contends that defendants deprived her of her First Amendment rights by transferring her from her position in the Public Works Department ("Public Works")[1] in retaliation for testimony she gave before the Ethics Office. The Supreme Court has held that "a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." *Connick v. Myers*, 461 U.S. 138, 140 (1983). A plaintiff making a First Amendment retaliation claim under §1983 must demonstrate by a preponderance of the evidence that: (1) her speech was constitutionally protected, (2) she suffered an adverse employment action, and (3) a

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[1] The title of the department in Spanish is "Limpieza, Ornato y Urbanismo" and is often referred to in the record as "Ornate" or "Cleaning".

causal connection exists between the speech and the adverse employment action, so that it can be said the her speech was a motivating factor in the determination. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 283-87 (1977); *Guilloty v. Pierluisi,* 339 F.3d 43, 55-56 (1st Cir. 2003).

A. Adverse Employment Action

Defendants first attack the sufficiency of the trial evidence that Rodríguez-García was subjected to an adverse employment action. The First Circuit has held that an adverse employment action may include "not only discharge and demotions, but also a government entity's refusal to promote, transfer, recall after layoff, or even hire an employee." *Morales-Talnon v. Puerto Rico Elec. Power Auth.,* 524 F.3d 15, 19 (1st Cir. 2008). In order to establish an adverse employment action, the employee must demonstrate that his/her new working conditions are "unreasonably inferior" to the norm for that position. *Agosto-de-Feliciano v. Aponte-Roque,* 889 F.2d 1209, 1218 (1st Cir. 1989). "To determine whether such a reduction has occurred . . . the fact finder should canvass the specific ways in which the plaintiff's job has changed." *Id.* Although a purely lateral transfer that does not involve a demotion in form or substance is not actionable, utterly depriving an employee of work may establish an adverse employment action. *Id.* at 1219-20.

In this case, Rodríguez-García held the same title and salary before and after her transfer. Nevertheless, the evidence presented at trial enabled the jury to reasonably conclude that she suffered an adverse employment action. Before her transfer, Rodríguez-García held the position of Executive Secretary I at Public Works. Her duties included receiving mail, filing, scheduling the director's tasks, and other duties, and she received merit increases and bonuses while there. Around February of 2000, she initially was transferred to the municipality's Department of Education, but upon arriving was told there was no work for her to do there. She then was transferred to the Office of Federal Funds ("Federal Funds"), where she remained at the same salary until 2003. Although the parties dispute the matter, there was evidence from which the jury could reasonably conclude that Rodríguez did not request or agree to the transfer. Federal Funds was a small office that already had an Executive Secretary, and for many days Rodríguez-García received no work and performed no tasks, although she did occasionally answer the phone and take dictation when the other secretary was not there, and sometimes helped the receptionist with the mail, which took only a few minutes every day. Because she knew little English, she was unable to perform most of the tasks needed to be performed at the office, such as doing internet searches and taking dictation in English. Because she was not performing any duties, she did not request or receive salary increases or bonuses during the time she worked at the Federal Funds Office.

In short, the jury reasonably could have concluded that plaintiff did not have significant responsibilities at Federal Funds and that her transfer therefore constituted a demotion. Accordingly, the finding that plaintiff suffered an adverse employment action will not be disturbed.

B. Personal Liability of Miranda-Marín

Defendants next argue that the evidence was insufficient to establish the liability of Miranda-Marín. As the First Circuit determined, in order for Miranda-Marín to be liable under Section1983 in his personal capacity, the plaintiff must "establish that her constitutional injury resulted from the direct acts or omissions of the official, or from indirect 'conduct that amounts to condonation or tacit authorization.'" *Rodríguez-García v. Municipality of Caguas,* 495 F.3d 1, 10 (1st Cir. 2007), *citing Whitfield v. Meléndez-Rivera,* 431 F.3d 1, 14 (1st Cir. 2005).

Initially, Miranda-Marín does not dispute certain matters that were presented in evidence: that some time before December 1999, Rodríguez-García complained to Luisa Flores, her supervisor in Public Works, about receipt in that office of political material favoring the Popular Democratic Party ("PDP"); that in December 1999, Rodríguez-García testified regarding this matter as part of an investigation conducted by the Ethics Office; that in February 2000, she was transferred first to Education and then to Federal Funds; that Miranda-Marín, together with

the Vice Mayor and the Director of Human Resources, had the authority to transfer the plaintiff, or to reinstate her to her former position; and that Miranda-Marín, in addition to being mayor, was the leader of the PDP in Caguas. Instead, Miranda-Marín focuses his argument on whether the evidence at trial was sufficient to establish that he had personal knowledge of plaintiff's transfer, of her request to be reinstated, or her claim that the transfer was in retaliation for her testimony before the Ethics Office. To this end, he points out, correctly, that "one cannot make a 'deliberate' or 'conscious' choice . . . to act or not to act unless confronted with a problem that requires the taking of affirmative steps." *Lipsett v. U.P.R.*, 864 F.2d 881, 902 (1st Cir. 1988).

Contrary to defendants' argument, the record contains ample evidence from which the jury could conclude that Miranda-Marín knew of plaintiff's transfer, her claim that it was done in retaliation for her testimony, and her request to be reinstated. Initially, the record contains evidence from which the jury could conclude that Miranda-Marín was aware of the ethics probe and its nature. Luisa Flores, to whom plaintiff complained about distribution of political material, informed Miranda-Marín that she had been summoned by the Ethics Office, and Miranda Marín offered help in finding an attorney; moreover, the evidence showed that all PDP members of the Municipal Assembly had also been summoned, and that many of these officers were members of the ethics committee that met regularly with the mayor

regarding any alleged violations of the ethics laws. It would not require too great an imaginative leap for the jury to infer that Flores or one of the assemblymen informed the mayor of the nature of the ethical investigation.

More importantly, plaintiff's attorney sent at least three letters to Miranda-Marín regarding plaintiff's transfer and her request to be reinstated. In particular, a letter dated March 8, 2000, states that "Ms. Rodríguez García was transferred to the Office of Federal Affairs with no justification and as an apparent reprisal because your administration feels she provided information in an investigation" and that "Mrs. Rodríguez is not being assigned the duties of her position and that the purpose of said transfer is to pressure her and make her resign." (Exh. 3). The letter further requests an investigation and plaintiff's reinstatement. The Municipality's Director of Human Resources responded to the March 8 letter, saying that it had been referred by the mayor and that plaintiff would be reinstated. (Exh. 4). Plaintiff's attorney in turn responded with another letter (dated April 19, 2000) addressed to Miranda-Marín again requesting reinstatement. (Exh. 5). When reinstatement did not ensue, plaintiff's attorney sent a letter to the mayor dated May 31, 2000, informing of her intention to sue and stating that the refusal to reinstate the plaintiff was due to "the belief that she provided information that the Director of the Cleaning Department was doing political campaign in said office which motivated the Ethics Office

intervention." (Exh. 6). In addition to the letters from her attorney, plaintiff personally sent a letter to Miranda-Marín dated June 27, 2001, informing that she has been "despoiled" of her duties as Executive Secretary I and requesting the mayor's intervention. (Exh. 12).

Other evidence also suggested that Miranda-Marín was aware of plaintiff's request for reinstatement. Some time after her transfer, plaintiff confronted the mayor in a public square, vigorously shook him, and demanded to know what he intended to do about her case. Moreover, in late October 2000, plaintiff filed a lawsuit in state court against the municipality and its mayor regarding the same facts alleged in this case. Shortly after that case was filed, Miranda-Marín gave a statement to journalists indicating that he was aware of the case and stating that it was a scheme by plaintiff's lawyer and that plaintiff was the cousin of a political enemy.

Defendants do not dispute that these letters were received at the mayor's office; defendants do dispute, however, that the mayor personally received any of these letters, and point to evidence that correspondence routinely was routed to the appropriate municipal official before reaching the mayor's hands. Rodríguez-García counters by arguing that the letters were all addressed to him, that on cross examination he acknowledged that he could not be sure whether or not some letters were received, and that he gave a public statement to the press regarding plaintiff and her claims.

In the end, the First Circuit already has determined that "[a]lthough appellees argue strenuously that there was no evidence that the mayor personally received the Letters sent to him, this is a factual question appropriate for jury determination." *Rodríguez-García,* 495 F.3d at 13. Here, the jury was within its province to conclude that Miranda-Marín had notice of plaintiff's plight and failed to act to remedy it notwithstanding his authority to do so. *See Bisbal-Ramos,* 467 F.3d at 24 (finding Section 1983 liability where public official "had to have known what was happening, yet did nothing to stop it, and that this transformation caused Bisbal to be deprived of his duties."). "While the jury could have accepted the [defendant's] explanations for its actions, we cannot say that it was irrational for the jury to have concluded that . . . retaliation was the motivation for the . . . actions." *McDonough v. City of Quincy,* 452 F.3d 8, 19 (1st Cir. 2006). Miranda-Marín's motion for judgment as a matter of law is therefore denied.

C. Liability of the Municipality

The municipality also moves under Rule 50(b) to set aside the judgment against it. Municipalities may be held liable for acts of municipal employees where the employee's action constitutes a policy or custom of the government. *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 694 (1978). "Government policy or custom, though, may be established by 'a single decision by municipal policymakers under appropriate circumstances.'" *Kelly v. La Force*, 288 F.3d 1, 9 (1st Cir.

2002), *quoting Pembaur v. City of Cincinnati,* 475 U.S. 469, 480 (1986). "It is well established that the deliberate acts or omissions of a municipal policymaker with final authority over the subject matter in question may expose the municipality itself to liability." *Rodríguez-García,* 495 F.3d at 13. Moreover, the First Circuit has "repeatedly recognized that 'mayors in Puerto Rico are the government officials ultimately responsible for the employment decisions of the municipality." *Id. citing Rivera-Torres v. Ortiz Velez,* 341 F.3d 86, 103 (1st Cir. 2003).

In this case, the jury heard evidence that Miranda-Marín, as mayor, had the final authority over the transfers of municipal employees. Given the jury's finding that Miranda-Marín himself was liable under §1983 for retaliation in failing to reinstate plaintiff to her former position, the jury could also reasonably conclude that his action or inaction in this regard set the policy for the municipality. *See Rodríguez-García,* 495 F.3d at 14 ("municipal liability may be premised upon the mayor's liability"). Accordingly, the municipality's motion under Rule 50(b) is denied.

D. The *Mt. Healthy* Defense

Defendants also move for judgment under Rule 50(b) based on the *Mt. Healthy* defense. That defense provides that even if an employee shows that protected expression was a substantial or motivating factor in an adverse employment decision, the defendant may still prevail by proving by a preponderance of the

evidence that the governmental agency would have taken the same action against the employee even in the absence of the protected conduct. *See Guilloty,* 339 F.3d at 56, *citing Mt. Healthy,* 429 U.S. at 287. The standard for overturning a jury verdict based on the *Mt. Healthy* defense is a high one: the defendants "need to show that no reasonable jury could have denied their *Mt. Healthy* defense." *Rodríguez-Marín v. Rivera-Gonzalez,* 438 F.3d 72, 81 (1st Cir. 2006).

Defendants base their *Mt. Healthy* defense on evidence that following an incident between Rodríguez-García and her supervisor, plaintiff's physician recommended that plaintiff be assigned to another area. While the jury was entitled to find that this was the reason for plaintiff's original transfer, it was not compelled to do so, and the jury reasonably could have found that the "but-for" cause of her transfer was her testimony before the Ethics Office. In particular, there was evidence presented at trial that plaintiff was transferred shortly after all of the following series of events occurred: (1) plaintiff objected to Luisa Flores about distribution of political materials in the office; (2) plaintiff testified before the Ethics Office; (3) Flores received summons to provide information to the Ethics Office on the subject of distribution of political propaganda; and (4) Flores had discussed the summons with Miranda-Marín. *See Philip v. Cronin,* No. 06-1680, ___ F.3d ___, 2008 U.S. App. LEXIS 16703, at *17-19 (1st Cir. Aug. 7, 2008) (temporal proximity between protected conduct and employer action constitutes evidence of retaliation);

Guilloty Perez, 339 F.3d at 57 (timing is circumstantial evidence of a retaliatory motive). Moreover, the recommendation from plaintiff's doctor also does not explain why plaintiff was kept at Federal Funds for a period of three years despite repeated requests to be reinstated to her old position and after she was informed by the head of Human Resources that her relocation was merely "a temporary administrative transfer." (Exh. 4). Given this conflicting evidence, the jury reasonably could have rejected the *Mt. Healthy* defense.

II. Motion for New Trial

Defendants also move for a new trial pursuant to Rule 59. Under Rule 59, "[t]rial judges have more leeway to grant new trials than to set aside verdicts based on insufficiency of the evidence under Rule 50. They may consider their view of the credibility of the witnesses in doing so, but must be careful not to invade the jury's province." *Valentín-Almeyda*, 447 F.3d at 103. "And they may grant a new trial only if they are convinced that the verdict is against the clear weight of the evidence, such that letting it stand would result in a miscarriage of justice." *Id.* A new trial may also be granted when the district court determines that the amount of the verdict is so unreasonable that it shocks the conscience. *Consolo v. George*, 58 F.3d 791, 795 (1st Cir. 1995). In the end, the decision to grant a new trial is left to the sound discretion of the trial judge. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980).

Defendants raise three arguments in their motion under Rule 59: (1) that the court's failure to instruct the jury that Vice Mayor Wilfredo Puig took no adverse employment action against the plaintiff impermissibly allowed the jury to find liability based on Puig's actions; (2) that plaintiff was barred from basing liability on Puerto Rico's Law No. 115, and consequently the court erred in doubling the damages pursuant to that law; and (3) the amount of the jury's award is so excessive as to shock the conscience. Each argument will be discussed in turn.

A. The Failure to Instruct as to Vice Mayor Puig

During the first trial, the jury was presented with a special verdict form asking whether co-defendant Vice Mayor Puig took an adverse employment action against the plaintiff. The jury answered that question in the negative, resulting in a finding of no liability as to Vice Mayor Puig. During the second trial, the remaining defendants (Miranda-Marín and the municipality) invoked the doctrine of collateral estoppel and moved that the jury be instructed that Puig took no adverse employment action against the plaintiff. (Docket No. 258, 259).[2] The court denied

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[2] Defendants first raised this issue in the proposed pretrial order. (Docket No. 213, p. 84). At the pretrial conference, the court ordered the parties to address any such issues in motions in *limine* to be filed by January 15, 2008. (Docket No. 214). Defendants did not file a motion in *limine* as to this issue, but

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that request in a written order. (Docket No. 263). The defendants now argue that the failure to give this instruction confused the jury and permitted supervisory liability based on the acts of Puig. While defendants raise a legitimate concern, their argument ultimately lacks merit.

As discussed in this court's previous order, "issue preclusion is not available as a matter of right." 18A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §4465 (2002). The First Circuit has found no error in refusing to apply collateral estoppel when to do so would confuse remaining matters to be decided by the jury. *Biggins v. Hazen Paper Co.*, III F.3d 205, 210 (1st Cir. 1997), *citing* Fed. R. Evid. 403. Moreover, "[w]here even one issue of liability . . . [remains] in the second trial, granting preclusive effect to the other issues may not result in efficiency gains because litigation of the 'live' issue may require introduction of some of the same evidence pertinent to the estopped issues." *Acevedo-García v. Monroig*, 351 F.3d 547, 577 (1st Cir. 2003), *citing* 18A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §4465.3 ("The need to relitigate individual issues that overlap the common issues may provide a special reason to deny preclusion – little if any trial time will be spared . . . ").

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raised the issue again during trial, which prompted the court to request from the bench that the parties file briefs on the matter.

In this case, I denied the requested instruction upon finding that, if given, it may have unduly influenced the jury in determining issues that were closely and factually related to the first jury's finding but which were not necessarily determined by the first jury. *See* Fed. R. Evid. 403. These issues, which were hotly contested by the parties, included whether plaintiff's transfer and alleged deprivation of duties rose to the level of adverse employment action, and whether plaintiff was transferred at her own request (as defendants claim) or in retaliation for exercising her First Amendment rights (as she claims). I further found that the evidence regarding Puig's actions was closely intertwined with evidence regarding other municipal actors, such as plaintiff's supervisor (Luisa Flores), the human resources director, and the Federal Funds director who themselves, consistent with plaintiff's theory of the case, may have taken decisions related to the transfer and failure to reinstate that were endorsed or condoned by the mayor. In short, the requested instruction regarding Puig may have resulted in the unintended effect of creating an inference that *no* municipal actors took an adverse employment action against the plaintiff, or that plaintiff's transfer and deprivation of duties did not rise to an adverse employment action. Moreover, because the issue regarding Vice Mayor Puig was intertwined with other evidence in the case, the interest of judicial economy did not favor granting the instruction requested since the court must hear essentially the same evidence at trial. *See Acevedo-García,* 351 F.3d at 577. Under these circumstances,

the defendants in the second trial – which did not include Vice Mayor Puig – were not entitled to have the issue precluded by means of the requested instruction. *See Biggins*, 111 F.3d at 210 (instruction as to issue preclusion not required when "the glare from such an instruction" would likely confuse the second jury).

Defendants also overstate the importance of Puig's actions as they relate to plaintiff's theory of the case as it was presented through evidence in the second trial. As discussed above, the evidence presented at trial was sufficient for the jury to determine that Miranda-Marín (1) had knowledge of the ethics probe; (2) had knowledge of plaintiff's claim that she was transferred and deprived of duties in retaliation to her testimony in that probe; (3) had knowledge of plaintiff's request for reinstatement to her former position; (4) had the authority to reinstate her; and (5) did not do so. Although there was evidence (elicited mainly by the defendants) that Puig authorized plaintiff's initial transfer in February 2000, no evidence was presented that Puig received any of plaintiff's requests for reinstatement, or that he was involved in any decision not to reinstate her from February 2000 until early 2003; rather, the evidence presented at trial indicated that all such requests were made to Miranda-Marín and were referred to the head of Human Resources. Consequently, I find no basis for defendants' argument that the verdict for plaintiff was the result of juror confusion; nor would letting the verdict stand result in a miscarriage of

justice under these circumstances. Accordingly, the motion for a new trial is denied.

B. The Act No. 115 Claim

Prior to the second trial, the defendants filed a motion in limine arguing that plaintiff should be barred from presenting any claim based on Puerto Rico's Act No. 115. Specifically, defendants argued that plaintiff waived any Act 115 claim by not pursuing it in the first trial, and that the claim was precluded by the First Circuit's opinion in the appeal of the judgment entered following the first trial and by the "law of the case" doctrine. The court concluded that although the First Circuit's opinion remanding the case limited the factual theory plaintiff may present in pursuit of her retaliation claim, it did not preclude that theory from being based on Puerto Rico law. (Docket No. 250).[3] Accordingly, after the trial concluded, the court doubled the damages found by the jury by operation of Act No. 115.[4] Defendants now

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[3] Because the court found that the scope of plaintiff's factual theory on remand was the same for both the Section 1983 and Act No. 115 claims, the allowance of the Act No. 115 in the second trial did not affect the evidence or instructions presented to the jury, although it did result in doubling the damages found by the jury by operation of Act No. 115.

[4] Puerto Rico's Act No. 115, which prohibits discrimination in employment for sharing testimony, provides in part that "[t]he employer's liability regarding the damages and the unearned salaries shall be double the amount determined as

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argue that the court erred in entering an order doubling the damages under Act No. 115, raising the same arguments mentioned above. After a thorough review of the record, I am now convinced that plaintiff waived her Act No. 115 claim earlier in these proceedings.

To decide this issue, the court must retrace the steps of the Act No. 115 claim back through the docket. Defendants initially argue that plaintiff did not raise a claim under Act No. 115 in her complaint. Defendants are only partially correct. Paragraph 2 of the complaint, which concerns the jurisdictional basis, states that plaintiff is bringing causes of action arising under the laws of Puerto Rico, "among them, Act 115 of December 20, 1991, 29 L.P.R.A. §194(a)." Nevertheless, Act No. 115 is not included as one of the legal basis for claims listed in paragraph 7. Nor does the prayer for relief request double damages pursuant to Act No. 115 or any other statute, although it does make a request that plaintiff receive "all damages to which she is entitled".

More damaging to plaintiff is the joint proposed pretrial order filed before the first trial in 2004. (Docket No. 83). In the 2004 pretrial order, plaintiff asserted certain claims arising under Puerto Rico

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having caused the violations . . . of this title." 29 L.P.R.A. §194a(b).

law;[5] however, those claims did not include a cause of action under Act No. 115, nor a request for double damages under that Act. This omission did not go unnoticed, insofar as defendants asserted in the "nature of the case" section that the complaint failed to claim a remedy under Act No. 115. (Docket No. 83, p. 2). The 2004 proposed pretrial order was approved by the court. (Docket No. 84).

Importantly, a final pretrial order "is intended to 'control the subsequent course of the action,' and can be modified only to prevent manifest injustice.'" *Correa Gonzalez v. Hospital San Francisco,* 69 F.3d 1184, 1195 (1st Cir. 1995), *quoting* Fed. R. Civ. P. 16(e). A court "should not lightly relieve a litigant from the condign consequences of its failure to list a theory . . . at that critical stage of the proceedings." *Id.* "If pretrial orders are to achieve their intended purpose, courts and litigants must ordinarily take them seriously." *Id.* (quotation omitted). Accordingly, "issues not included in the final pretrial order are generally waived." *Id., citing Ramirez Pomales v. Becton Dickinson & Co.*, 839 F.2d 1, 3 (1st Cir. 1988). Germane to the present case, "[t]he failure to state the damages that the plaintiff is specifically seeking in the pretrial order waives that claim for relief."

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[5] In the final pretrial order filed before the first trial, plaintiff asserted claims under Article II, section 1, 6, and 7 of the Puerto Rico Constitution; Act No. 5 of October 14, 1975, 3 L.P.R.A. §§1301, *et seq.*; and Articles 1802 and 1803 of the Puerto Rico Civil Code, 31 L.P.R.A. §§5141, 5142.

Ramos v. Davis & Geck, Inc., 968 F.Supp. 765, 771 (D.P.R. 1997). As mentioned above, the 2004 final pretrial order did not contain a claim under Act No. 115 in its discussion of plaintiff's state law claims, nor did it request the Act's special remedy of double damages. As of that point, then, plaintiff had waived any claim under Act No. 115.

The question thus becomes whether the Act No. 115 claim, somehow was resurrected subsequently. The record reveals it was not. First, Rodríguez-García never sought to amend the 2004 pretrial order before the first trial. However, after the close of evidence, plaintiff did argue during a discussion with the court that Act No. 115's three-year statute of limitations applied. (Docket No. 196, p. 189). Defendants quickly objected to plaintiff's attempt to "amend the complaint [to include an Act No. 115 claim] at this time, when all the parties have rested their case." *Id.* at p. 191. The court agreed with the defendants, stating, "they are not amending their case to be Law 115." *Id.*

Notwithstanding that exchange, the next day Rodríguez-García requested a jury instruction under Act No. 115. (Docket No. 179, p. 20). The magistrate judge who presided over the first trial did not specifically rule on this request, although the court did instruct the jury that plaintiff's claims arising under Puerto Rico law were "identical for all practical purposes to the federal claim." (Docket No. 179,

p. 49).[6] Plaintiff contends that by providing this instruction on Puerto Rico law the court tacitly acknowledged that Act No. 115 was a live issue. The problem with this argument is that the court's instruction more plausibly referred not to Act No. 115 but to the Puerto Rico law claims that plaintiff raised in the 2004 pretrial order. The court never mentioned Act No. 115 when giving this instruction, and, moreover, already had informed the parties of its intent to give this instruction the previous day during the same discussion in which it rejected plaintiff's attempt to amend to include Act No. 115. *See* Docket No. 196, p. 197. Thus, the court's Puerto Rico law instruction provides no weight to plaintiff's argument that Act No. 115 was a viable theory during the first trial.

After the first trial, plaintiff appealed the orders and jury verdict dismissing her various claims. Noting at the outset that these claims were based on "the First Amendment and Puerto Rico law", *Rodríguez-García,* 495 F.3d at 2, the First Circuit affirmed the

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[6] The court's instruction was as follows: "Also the plaintiff, I mentioned at [the] beginning of the case, has also brought a claim under the Puerto Rico Constitution and local statute, which allows those claims under the Constitution of Puerto Rico to be brought before the court. But I must tell you that that claim under the Puerto Rico law, for all purposes is identical for all practical purposes to the federal claim. As such I will not give you separated instructions as to that claim for if you find that defendants are liable under the federal law, for all purposes they are liable also under Puerto Rico law." (Docket No. 179, p. 48-49).

dismissals of the political discrimination claim as well as the jury's verdict in favor of Vice Mayor Puig, but remanded for retrial of the retaliation claims against Miranda-Marín and (since its liability may derive from the mayor's) the municipality. In denying defendant's pretrial motion in *limine* to exclude the Act No. 115 claim from the second trial, I noted that "although the First Circuit's Opinion directs that municipal liability must be factually premised on the mayor's liability, nothing in the Opinion suggests that the legal underpinning of that liability must be a federal, as opposed to a state law, cause of action." (Docket No. 250). While that statement remains true as far as it goes, it improvidently assumed (1) that the court's reference to "Puerto Rico law" referred to Act No. 115 and not to other local claims, and (2) that Act No. 115 had not been waived before the first trial. As discussed above, plaintiff had properly asserted certain Puerto Rico law claims in the 2004 pretrial order, but those did not include Act No. 115, which consequently was waived.

On remand, Rodríguez-García asserted an Act No. 115 claim in the joint proposed amended proposed pretrial order. (Docket No. 213) ("2007 pretrial order"). Defendant objected to this inclusion in the same joint proposed order, as well as in a pretrial motion in *limine*. Because plaintiff, in the 2007 pretrial order, sought to amend the 2004 pretrial order to include a new claim and remedy, it was incumbent on plaintiff to demonstrate that such an amendment was necessary "to prevent manifest

injustice." Fed. R. Civ. P. 16(e); *Correa González,* 69 F.3d at 1195. Here, no such showing has been made in plaintiff's responses to the pretrial motion in *limine* or to the post-trial motion for a new trial. Plaintiff mentioned Act No. 115 only in. passing in the complaint, and abandoned it entirely in the 2004 pretrial order. The record also does not indicate that the court allowed such a claim during the first trial. In short, plaintiff has not pointed to circumstances that warrant placing her in a better position during the second trial than she was in the first. *See García Guzman v. Ramírez de Arellano de Villoldo,* 245 F.Supp. 2d 388, 393 (D.P.R. 2003) (law of the case doctrine posits that a decision should continue to govern the same issues in subsequent stages of case and should be applied in the absence of special circumstances). Although failure to allow the Act No. 115 claim will deprive plaintiff of the special remedy of double the damages found by the jury, that in itself does not constitute a manifest injustice; even without the waived claim plaintiff was allowed to present her factual theory to the jury and to recover for all of the damages proven.

Because the Act No. 115 claim was waived before the first trial, and because no manifest injustice was shown requiring modification of the 2004 pretrial order, the decision to deny defendant's motion in *limine* was error that may be corrected pursuant to Rule 59(e). Judgement will therefore be amended to award only those damages found by the jury.

C. Remittitur

Defendants also argue that the damages awarded are excessive. However, a jury's award may not be overturned " unless it is grossly excessive or so high as to shock the conscience of this court." *Valentín-Almeyda,* 447 F.3d at 103. "These deferential standards of review implicitly recognize that 'translating legal damage into money damages – especially in cases which involve few significant items of measurable economic loss – is a matter peculiarly within the jury's ken.'" *Acevedo-García v. Monroig,* 351 F.3d at 566, *quoting Gutiérrez-Rodríguez v. Cartagena,* 882 F.2d 553, 577-78 (1st Cir. 1989).

In this case, plaintiff testified that because she was transferred, deprived of duties, and not reinstated she suffered severe depression lasting many months and resulting in hospitalization. Her testimony was supported by medical records and the testimony of treating professionals. The First Circuit has affirmed awards of similar amounts for emotional distress for plaintiffs that produced far less in the way of medical evidence than has been presented here. *See, e.g., McDonough v. City of Quincy,* 452 F.3d 8, 22 (1st Cir. 2006) (affirming award of $300,000, the bulk of which was for emotional distress). Although the jury's award of $350,000 in this case was generous, it was not so excessive as to shock the conscience, and will not be disturbed.

III. Conclusion

Defendants' motion under Rule 50(b) is **denied**. Defendants' motion under Rule 59(e) to eliminate Act No. 115's doubling of damages is granted; all of the other motions under Rule 59 are **denied**. Amended judgment in the amount of $350,000.00 will be entered.

In San Juan, Puerto Rico, this 18th day of August, 2008.

/s/ Bruce J. McGiverin
BRUCE J. MCGIVERIN
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CARMEN RODRIGUEZ-GARCIA Plaintiff v. MUNICIPALITY OF CAGUAS, ET AL Defendants	CIV. NO. 01-2525 (BJM)

ORDER

This case involves plaintiff's claim that she was transferred from her position as a secretary, and not reinstated to that position, in retaliation for making statements on matters of public concern in violation of her First Amendment rights as enforceable under 42 U.S.C. §1983. During the first trial, the jury was presented with a special verdict form asking whether co-defendant Vice Mayor Puig took an adverse employment action against the plaintiff. The jury answered that question in the negative, resulting in a finding of no liability as to Vice Mayor Puig. The two defendants on retrial, Mayor William Miranda Marin and the Municipality of Caguas, invoke the doctrine of collateral estoppel and move that the jury be instructed that Vice Mayor Puig took no adverse employment action against the plaintiff. Both

parties filed written arguments at the court's request. (Docket No. 258, 259).[1]

"Collateral estoppel, now often called issue preclusion, prevents a party from relitigating at a second trial issues determined between the same parties by an earlier final judgment – subject to some limitations." *Biggins v. Hazen Paper Co.*, 111 F.3d 205, 209 (1st Cir. 1997). Issue preclusion may be invoked when (1) the issue sought to be precluded was the same as that involved in the prior action; (2) the issue was actually litigated; (3) the issue was determined by a valid and final judgment; and (4) the issue was essential to that judgment. *Faigin v. Kelly*, 184 F.3d 67, 78 (1st Cir. 1999). Moreover, "collateral estoppel is no longer limited to ultimate issues: necessary *intermediate* findings can now be used to preclude relitigation." *Biggins*, 111 F.3d at 210.

Although mutuality of the parties in the two actions used to be required, the Supreme Court has recognized since at least 1971 that a plaintiff may be precluded from litigating an issue he/she lost in a first trial against a new defendant in a second proceeding, provided the plaintiff had a full and fair

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[1] Defendants first raised this issue in the proposed pretrial order. (Docket No. 213, p. 83). At the pretrial conference, the court ordered the parties to address any such issues in motions in limine to be filed by January 15, 2008. (Docket No. 214). Defendants did not file a motion in limine as to this issue, but raised the issue again during trial, which prompted the court to request from the bench that the parties file briefs on the matter.

opportunity to litigate the issue in the first case. *Blonder-Tongue Labs. v. Univ. of Illinois Found.*, 402 U.S. 313, 329 (1971).

Notwithstanding the above, "issue preclusion is not available as a matter of right." 18A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §4465 (2002). The First Circuit has found no error in refusing to apply collateral estoppel when to do so would confuse the matter to be decided by the jury. *Biggins*, 111 F.3d at 210, *citing* Fed. R. Evid. 403. Moreover, "[w]here even one issue of liability . . . [remains] in the second trial, granting preclusive effect to the other issues may not result in efficiency gains because litigation of the 'live' issue may require introduction of some of the same evidence pertinent to the estopped issues." *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 577 (1st Cir. 2003), *citing* 18A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §4465.3 ("The need to relitigate individual issues that overlap the common issues may provide a special reason to deny preclusion – little if any trial time will be spared . . . ").

In this case, plaintiff argues that nonmutual defensive collateral estoppel is inappropriate because the issue decided in the first trial – though dispositive of the case against Vice Mayor Puig – is irrelevant to the liability of the remaining defendants.[2]

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[2] The court dismissed the claim against Mayor Miranda Marin under Rule 50 at the close of plaintiff's evidence during

(Continued on following page)

Accordingly, the standard for imposing liability on the remaining defendants must be examined.

As the First Circuit determined, Mayor Miranda Marin may be liable under 42 U.S.C. §1983 in his personal capacity "if the plaintiff can establish that her constitutional injury resulted from the direct acts or omissions of the official, or from indirect 'conduct that amounts to condonation or tacit authorization.'" *Rodriguez-Garcia v. Municipality of Caguas*, 495 F.3d 1, 10 (1st Cir. 2007), *citing Whitfield v. Melendez-Rivera*, 431 F.3d 1, 14 (1st Cir. 2005). In either case, however, the plaintiff must prove, as part of establishing her alleged constitutional injury, that she was subjected to an adverse employment action. *Guilloty Perez v. Pierluisi*, 339 F.3d 43, 51 (1st Cir. 2003). Thus, the first jury's finding that Vice Mayor Puig took no adverse employment action against the plaintiff is relevant in the retrial insofar as plaintiff's theory of liability depends on showing that he was the one responsible for her transfer. With respect to the Municipality, the First Circuit determined that the Municipality's liability may be premised on the mayor's liability, since the acts and omissions of a municipal policymaker with final authority over the subject matter in question may expose a municipality itself to liability. *Rodriguez-Garcia*, 495 F.3d at 13.

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the first trial. That decision was reversed by the First Circuit and remanded for a new trial against the Mayor and the Municipality.

Plaintiff points out that the first jury's determination, even if imposed in the second trial, would not dispose of her claims against the remaining defendants. This is true, insofar as the second jury could determine that Mayor Miranda Marin directly took an adverse employment action against plaintiff, or that his conduct was to condone or tacitly authorize such an action taken by someone other than Vice Mayor Puig. As mentioned above, however, application of collateral estoppel is not limited to ultimate issues and may be applied to necessary intermediate determinations. *Biggins*, 111 F.3d at 210.

Much more problematic is whether the requested instruction is likely to unduly confuse the jury. Again, *Biggins* is instructive. There, a jury in the first trial determined by means of special verdict forms that, *inter alia*, "defendants wrongfully discharged plaintiff in order to deprive plaintiff of the promised stock compensation." *Biggins*, 111 F.3d at 210. During retrial on an age discrimination claim, the plaintiff sought a jury instruction conforming to the first jury's finding. The First Circuit, citing Fed. R. Evid. 403, affirmed the trial court's refusal to give the instruction, noting that it was unclear how the second jury would understand the instruction, and that "the glare from such an instruction" would likely confuse the second jury, whose task was "to sort out any age discrimination motive in the tangle of other possible motivations, including perceived disloyalty, compensation quarrels, and the like." *Id.*

In this case, I find that the requested instruction, if given, may unduly influence the jury in determining issues that are closely and factually related to the first jury's finding but which were not necessarily determined by the jury at the first trial. *See* Fed. R. Evid. 403. These issues, which are hotly contested by the parties, include whether plaintiff's transfer and alleged deprivation of duties constituted an adverse employment action, and whether plaintiff was transferred at her own request (as defendants claim) or in retaliation for exercising her First Amendment rights (as she claims). In short, an instruction that Vice Mayor Puig took no adverse employment action might lead the jury to make an improper inference as to these closely related issues that were not decided in the first case. Moreover, the evidence regarding Vice Mayor Puig's actions in this case is closely intertwined with evidence regarding other municipal actors, such as plaintiff's supervisor and the human resources director, who themselves may, consistent with plaintiff's theory of the case, have taken decisions related to the transfer. The requested instruction regarding Vice Mayor Puig may have the unintended effect of creating an inference that none of the municipal actors took an adverse employment action against the plaintiff.

Finally, because the issue regarding Vice Mayor Puig is so closely intertwined with related issues still in the case, the interest of judicial economy will not be served by granting the instruction requested since the court must hear essentially the same evidence at

trial. *See Acevedo-Garcia*, 351 F.3d at 577. To the contrary, granting the requested instruction most likely will result in additional time being spent by the court and parties addressing proposed additional instructions, and resolving objections thereto, needed to disentangle the facts regarding Vice Mayor Puig from the closely related issues that remain in the case.

Accordingly, defendants' request to instruct the jury that Vice Mayor Puig took no adverse employment action against the plaintiff is **DENIED**.

In San Juan, Puerto Rico this 12th day of February, 2008.

S/ Bruce J. McGiverin
BRUCE J. MCGIVERIN
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CARMEN RODRIGUEZ-GARCIA Plaintiff v. MUNICIPALITY OF CAGUAS, ET AL Defendants	**CIVIL NO. 01-2525 (HL/GAG)**

ORDER

On December 29, 2004, the jury issued a verdict finding co-defendant Wilfredo Puig not liable for retaliating against plaintiff (Docket No. 134). The jury, however, issued a verdict finding the Municipality of Caguas liable for retaliating against plaintiff, and awarded damages against said defendant in the amount of $285,000.00 (*Id.*).

Plaintiff's theory of municipal liability throughout trial rested entirely on Wilfredo Puig retaliating against plaintiff, and this defendant having "final authority" so as for his acts to bind the Municipality.[1]

[1] In the alternative, this theory was also pursued with respect to Mayor Miranda Marin, as to whom the Court entered a Rule 50 judgment at the close of plaintiff's case in chief.

Jury instructions and a verdict form were thus provided accordingly, after ample discussion with counsel for the parties. As the jury found Puig not liable to plaintiff, it follows that Municipal liability under Section 1983 cannot attach under Puig's actions. *Consequently, the Court, pursuant to Fed. R. civ. P. 50, hereby enters judgment as a matter of law in favor of the Municipality of Caguas, notwithstanding the jury verdict.*

The Court notes that after the Court read the jury instructions, but prior to the jury deliberating, counsel for plaintiff agreed to the above. However, following the jury verdict, counsel argued that the verdict against the Municipality should stand based on pattern or practice theory.

SO ORDERED.

Date: January 10, 2005

S/ Gustavo A. Gelpi
GUSTAVO A. GELPI
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CARMEN RODRIGUEZ-GARCIA Plaintiff v. MUNICIPALITY OF CAGUAS, ET AL Defendants	CIVIL NO. 01-2525 (BJM)

VERDICT FORM

1. Do you find by a preponderance of the evidence that plaintiff Carmen Rodriguez Garcia's transfer, or failure to be reinstated, was an adverse employment action?

   Yes ✓ No _____

   If your answer is "YES," go to the next question. If your answer is "NO" you must issue a verdict for the defendants and stop filling out this form.

2. Do you find by a preponderance of the evidence that plaintiff's transfer, or failure to be reinstated, resulted from Mayor William Miranda Marin's direct acts or omissions, or from his indirect conduct that amounted to condonation or tacit authorization?

   Yes ✓ No _____

If your answer is "YES," go on to the next question. If your answer is "NO," you must issue a verdict for the defendants and stop filling out this form.

3. Do you find by a preponderance of the evidence that Mayor William Miranda Marin's acts or omissions regarding plaintiff's transfer, or her failure to be reinstated, were motivated in part by the statements she offered before the Government Ethics Office?

Yes ✓ No _____

If your answer is "YES," go on to the next question. If your answer is "NO," you must issue a verdict for the defendants and stop filling out this form.

4. Do you find by a preponderance of the evidence that plaintiff would have been transferred, and not reinstated, for a legitimate, non-retaliatory reason even if she never had provided testimony to the Government Ethics Office?

Yes _____ No ✓

If your answer is "NO," go on to the next question. If your answer is "YES," you must issue a verdict for the defendants and stop filling out this form.

5. Do you find by a preponderance of the evidence that Carmen Rodriguez Garcia suffered emotional pain and suffering due to her transfer or failure to be reinstated?

Yes ✓ No _____

If YES, we the jury find defendants William Miranda Marin and the Municipality of Caguas liable in the amount of $ 350,000.00

In San Juan, Puerto Rico, this 19 day of February, 2008.

/s/ [Illegible]
Foreperson Signature